

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ROBERT ROYCE BYFORD,
Petitioner,
v.

Case No. 3:11-cv-00112-JCM-WGC

ORDER

WILLIAM GITTERE, *et al.*,
Respondents.

I. SUMMARY

This action is a petition for writ of habeas corpus by Robert Royce Byford, a Nevada prisoner sentenced to death. The case is before the Court with respect to a motion to dismiss filed by the respondents and a related motion for leave to conduct discovery and motion for evidentiary hearing filed by Byford. In the motion to dismiss, Respondents assert that certain claims in Byford's third amended habeas petition are barred by the statute of limitations, unexhausted, procedurally defaulted, and unripe. The Court will grant the motion to dismiss in part and deny it in part. The Court will dismiss certain of Byford's claims as barred by the statute of limitations. The Court will deny the motion to dismiss, without prejudice, to the extent it is made on grounds of exhaustion, procedural default, and ripeness. The Court will deny Byford's motion for leave to conduct discovery and his motion for evidentiary hearing, without prejudice to Byford making new such motions in conjunction with the briefing of the merits of his remaining claims, as contemplated in the scheduling order in this action. The Court will set a schedule for the respondents to file an answer.

1 II. BACKGROUND

2 Byford was convicted in 1998, in Nevada's Eighth Judicial District Court (Clark
3 County), of first-degree murder with use of deadly weapon, and he was sentenced to
4 death. See Amended Judgment of Conviction, Exh. 2 (ECF No. 1-3, pp. 5–6). In its
5 opinion on Byford's direct appeal, the Nevada Supreme Court described the
6 background of the case as follows:

7 In 1992, the State charged appellant Robert Royce Byford and two
8 codefendants, Christopher Garth Williams and Todd Smith, with the
9 murder of Monica Wilkins. Smith later pleaded guilty to one count of
10 accessory to murder and agreed to testify against Byford and Williams. In
11 1994, Byford and Williams were found guilty by a jury and sentenced to
death, but this court reversed their convictions and remanded for retrial
due to violation of their Fifth Amendment right to remain silent. *Murray v.*
State, 113 Nev. 11, 930 P.2d 121 (1997).

12 After retrial, Byford and Williams were again convicted. Byford
13 received a death sentence, and Williams a term of life in prison without the
possibility of parole.

14 * * *

15 Byford's second trial began in February 1998, at which time the
following evidence was adduced.

16 Byford, Williams, and two teenage girls were visiting Smith at his
17 parents' residence in Las Vegas on March 8, 1991. Byford was twenty
years old, Williams seventeen, and Smith nineteen. Monica Wilkins, who
18 was eighteen, called and told Smith she would pay him for a ride home
from a local casino. Smith drove his jeep to pick Wilkins up, accompanied
19 by Williams and one of the girls. After Smith picked up Wilkins and her
friend, Jennifer Green, he asked Wilkins for gas money. Wilkins had Smith
20 stop at a Burger King so that she could get some money. Williams went
inside the store to see what was taking her so long, and Wilkins told him
21 that she had gotten another ride. Smith and Williams were upset with
Wilkins, and after they drove away, Williams fired a handgun out the
22 window of the jeep.

23 Smith testified that Wilkins had angered him, Williams, and Byford
before because she had invited them to her apartment to party but then
left with other men. Byford and Williams had talked about "get[ting] rid of
24 her" because she was always "playing games with our heads." Smith
participated in the talk but took the threats as jokes.

25 Later that night, Smith, Williams, and Byford were together at
26 Smith's house when Wilkins called again for a ride home. Accompanied by
Byford and Williams, Smith drove to pick her up. Smith then drove all four
27 of them to the desert outside of town to find a party that Byford heard was
taking place. Wilkins told the other three that she had taken LSD earlier
28 and was hallucinating. Smith drove to the usual area for parties, but they

1 found no party. They then stopped so that everyone could urinate. Wilkins
2 walked up a ravine to do so.

3 Smith testified to the following. As Wilkins finished, Byford handed
4 Williams a handgun and said he "couldn't do it." Smith asked Byford what
5 he was doing with the gun, and Byford told Smith to "stay out of it."
6 Williams then shot Wilkins in the back three to five times. She screamed
7 and fell to the ground. Wilkins got up, walked to Williams, and asked him
8 why he had shot her. He told her that he had only shot around her. Wilkins
9 walked up out of the ravine but then felt the back of her neck, saw that she
10 was bleeding, and again confronted Williams. Williams told her that he
11 shot her because she was "a bitch." He then walked behind her and shot
12 her again repeatedly. Wilkins screamed and fell to the ground again.
13 Byford then took the gun from Williams, said that he would "make sure the
14 bitch is dead," and fired two shots into her head. Byford then got a can of
15 gasoline from the jeep and poured it on Wilkins. Byford tried to hand a
16 lighter to Smith and get him to light the gasoline, but Smith refused. Byford
17 called him a "wussie" and lit the body. As it burned, the three drove off. As
18 they returned to Las Vegas, Byford pointed the handgun at Smith and
19 threatened to kill him if he ever told anyone.

20 Smith further testified that about a week after the murder, Byford
21 and Williams had him drive them back to the desert to bury the body. An
22 inmate who was incarcerated in jail with Byford and Williams after their
23 arrest also testified that the two told him about this trip back to the body.
24 They told the inmate that the body was decomposing and had maggots on
25 it. Byford and Williams rolled the corpse into the ravine and partly covered
26 it with a few shovelfuls of dirt.

27 After about two more weeks, the body was discovered by target
28 shooters. Las Vegas Metropolitan Police Department investigators
collected sixteen .25 caliber shell casings at the site; ballistic testing
showed that all were fired from the same weapon. Ten .25 caliber bullets
were recovered; five were in the body. Three bullets were in the chest and
abdomen, and two were in the head. Either of the bullets in the head
would have been fatal. The body was partly eaten by coyotes or wild dogs.
Other bullets could have been lost from the body due to this eating or the
burning and decomposition of the body. The burning appeared to be
postmortem.

29 In mid-April 1991, Byford's friend, Billy Simpson, was visiting
30 Byford's residence. When the two came upon a dead rabbit covered with
31 maggots, Byford told Simpson that he had seen maggots on a human
32 body before. That same night, Simpson and his brother Chad observed
33 Byford and Williams engage in "play acting" in which Williams acted as if
34 he shot Byford with a gun, Byford fell and then stood back up, and
35 Williams opened his eyes wide and pretended to reload and shoot him
36 again. Byford and Williams explained that they had shot and killed Wilkins
37 in the desert and then burned her body.

38 In the spring or summer of 1991, Byford conversed with two girls in
a city park. He admitted to them that he and Williams had shot and killed a
girl in the desert and then burned her body. He told them that he wanted
to see what would happen when someone under the influence of "acid"
was shot. In August 1991, Byford told another friend that he was a "bad

1 person" and "had done evil things" because he had shot and killed
2 someone in order to know what it felt like to kill someone.

3 After the police investigation led to Byford and Williams, Byford
4 asked his girlfriend to provide an alibi for him by telling the police that on
5 the night of the murder they had been on the phone all night.

6 Neither Byford nor Williams testified. However, Williams introduced,
7 over Byford's objection, Byford's testimony from the first trial. The gist of
8 that prior testimony was that Smith and Wilkins were boyfriend and
9 girlfriend, that they argued that night, that Smith shot Wilkins, and that
10 Byford and Williams only aided Smith in concealing the crime. The
11 testimony also included Byford's admission that he had a prior felony
12 conviction for attempted possession of a stolen vehicle. In closing
13 argument, the prosecutor referred to Byford as a convicted felon.

14 The jury found Byford and Williams guilty of first-degree murder
15 with the use of a deadly weapon.

16 At the penalty hearing, the State called Marian Wilkins, the mother
17 of the victim, to testify on the impact of losing her daughter. A probation
18 officer testified that Byford had violated his probation conditions in 1991
19 and been placed under house arrest. Byford violated house arrest in 1992
20 by removing his transmitter bracelet and absconding. The officer also
21 described Byford's juvenile record, which included burglary in 1984 and
22 carrying a concealed weapon in 1987. A detention officer testified that in
23 1994 Byford was disciplined for fighting with another inmate at the Clark
24 County Detention Center; the officer considered Byford to be a behavioral
25 problem for the Center.

26 Two of Byford's aunts testified to Byford's good character growing
27 up, as did his sister. Byford's mother also testified on his behalf and
28 described him as a good boy and a caring son. Byford and his father had
often got in conflicts, and his father was "heavy-handed" in disciplining
him. Byford was very close to his grandfather. When his grandfather died,
he became angry and withdrawn and quit attending church. Byford's
mother was raising Byford's son. Byford talked with his son on the phone
and was a good influence on him.

Thomas Kinsora, a Ph.D. in clinical neuropsychology, testified for
Byford. Byford was diagnosed with attention deficit disorder as a child. He
had conflicts with and anger toward his father for the latter's abuse of
alcohol and emotional distance. Byford lost interest in school and
immersed himself in alcohol and marijuana after his grandfather's death.
He later used methamphetamines heavily for a time. After testing Byford,
Dr. Kinsora concluded that the results were largely unremarkable and that
Byford was not psychopathic.

Byford spoke briefly in allocution and said that he was sorry for his
part in Wilkins's death.

In Byford's case, jurors found one mitigating circumstance: possible
substance abuse. The jury found two aggravating circumstances: the
murder was committed by a person under sentence of imprisonment and
involved torture or mutilation of the victim. Byford received a sentence of
death.

1 *Byford v. State*, 116 Nev. 215, 220–24, 994 P.2d 700, 704–07 (2000) (a copy of the
2 Nevada Supreme Court’s opinion is found in the record at ECF No. 1-3, pp. 157–99).

3 Byford appealed, and on February 28, 2000, the Nevada Supreme Court affirmed
4 his conviction and sentence. See Appellant’s Opening Brief, Exh. 3 (ECF No. 1-3, pp.
5 8–116); Appellant’s Reply Brief, Exh. 4 (ECF No. 1-3, pp. 118–55); *Byford*, 116 Nev.
6 215, 994 P.2d 700 (2000). Byford then sought a writ of certiorari from the United States
7 Supreme Court, and the Court denied his petition on November 27, 2000. *Byford v.*
8 *Nevada*, 531 U.S. 1016 (2000).

9 Byford filed a petition for writ of habeas corpus in the state district court on
10 December 1, 2000. See Petition for Writ of Habeas Corpus, Exh. 2 (ECF No. 108-2).
11 The court appointed counsel for Byford, and, with counsel, Byford filed a supplement to
12 his petition. See Supplemental Petition, Exhs. 3, 4 (ECF Nos. 108-3, 108-4). Without
13 holding an evidentiary hearing, the court denied all of Byford’s ineffective assistance of
14 counsel claims and dismissed his other claims on state-law procedural grounds. See
15 Findings of Fact, Conclusions of Law and Order, Exh. 10 (ECF No. 108-10).

16 Byford appealed, and the Nevada Supreme Court vacated the judgment in part
17 and remanded with respect to the ineffective assistance of counsel claims, because the
18 district court did not provide adequate findings of fact and conclusions of law regarding
19 those claims. See Appellant’s Opening Brief, Exh. 6 (ECF Nos. 1-4, 1-5); Appellant’s
20 Reply Brief, Exh. 7 (ECF No. 1-6, pp. 2–45); Order Affirming in Part, Vacating in Part,
21 and Remanding, Exh. 8 (ECF No. 1-6, pp. 47–50). The Nevada Supreme Court affirmed
22 the judgment with respect to the dismissal of Byford’s other claims. See Order Affirming
23 in Part, Vacating in Part, and Remanding, Exh. 8 (ECF No. 1-6, pp. 47–50).

24 On remand, without holding an evidentiary hearing, the district court issued an
25 order again denying Byford’s ineffective assistance of counsel claims. See Findings of
26 Fact, Conclusions of Law and Order, Exh. 13 (ECF No. 108-13). Byford appealed, and
27 the Nevada Supreme Court again vacated the judgment and remanded. *Byford v. State*,
28

1 123 Nev. 67, 156 P.3d 691 (2007) (a copy of the Nevada Supreme Court's opinion is
2 found in the record at ECF No. 1-9, pp. 8–13).

3 On the second remand, the district court held an evidentiary hearing. Transcripts
4 of Evidentiary Hearing, Exhs. 19, 20 (ECF Nos. 108-19, 108-20). The district court then
5 entered an order again denying Byford's ineffective assistance of counsel claims. See
6 Amended Findings of Fact, Conclusions of Law and Order, Exh. 23 (ECF No. 108-23).
7 Byford appealed, and the Nevada Supreme Court affirmed on September 22, 2010. See
8 Appellant's Opening Brief, Exh. 13 (ECF No. 1-10); Appellant's Supplemental Opening
9 Brief, Exh. 14 (ECF No. 1-11, pp. 2–24); Appellant's Reply Brief, Exh. 15 (ECF No. 1-
10 11, pp. 26–94); Appellant's Supplemental Reply Brief, Exh. 16 (ECF No. 1-12, pp. 2–
11 19); *Byford v. State*, 126 Nev. 697, 367 P.3d 754 (2010) (unpublished) (a copy of the
12 Nevada Supreme Court's order is found in the record at ECF No. 1-12, pp. 21–55). The
13 Nevada Supreme Court's remittitur issued on January 31, 2011. See Docket Entries,
14 Exh. 24, p. 5 (ECF No. 108-24, p. 6).

15 Byford then initiated this federal habeas corpus action by filing a *pro se* petition
16 for writ of habeas corpus on February 15, 2011. ECF No. 1. After counsel was
17 appointed (ECF No. 4), Byford filed a first amended habeas petition on January 3, 2012.
18 ECF No. 17. He filed a second amended habeas petition on September 4, 2012. ECF
19 No. 46. On February 1, 2013, this action was stayed to allow Byford to further exhaust
20 claims in state court. ECF No. 53.

21 Byford initiated a second state habeas action on January 31, 2012; his petition in
22 that action essentially mirrored his second amended petition in this case. See Amended
23 Petition for Writ of Habeas Corpus, Exh. 28 (ECF Nos. 108-28, pp. 2–200). The state
24 district court dismissed the petition on state-law procedural grounds. See Findings of
25 Fact, Conclusions of Law and Order, Exh. 33 (ECF No. 109-5). Byford appealed and the
26 Nevada Supreme Court affirmed on September 22, 2016. See Order of Affirmance,
27 Exh. 38 (ECF No. 109-10).
28

On January 11, 2017, Byford initiated a third state habeas action, asserting a claim based on *Hurst v. Florida*, 577 U.S. 92 (2016). See Petition for Writ of Habeas Corpus, Exh. 39 (ECF No. 109-11). The state district court dismissed Byford's third state habeas action on state-law procedural grounds. See Findings of Fact, Conclusions of Law and Order, Exh. 44 (ECF No. 109-16). Byford appealed and the Nevada Supreme Court affirmed on September 13, 2019. See Order of Affirmance, Exh. 49 (ECF No. 109-21).

Meanwhile, in this case, on March 13, 2017, the Court temporarily lifted the stay and granted Byford leave to amend his petition to assert his claim based on *Hurst*. ECF Nos. 67, 68, 73. On October 24, 2019, after completion of Byford's third state habeas action, this Court lifted the stay in this case. ECF No. 88.

Byford then filed his third amended petition—now his operative habeas petition—on January 30, 2020. ECF No. 92. Byford's third amended petition includes the following claims of violations of his federal constitutional rights (characterized and organized here as in Byford's third amended petition):

- Claim 1. Trial counsel was ineffective during the guilt phase.
- A. Trial counsel failed to engage a firearms expert or crime scene reconstructionist.
 - B. Trial counsel failed to retain a medical expert or pathologist and failed to impeach Dr. Sheldon Green's testimony at trial with his previous testimony from the September 10, 1992, preliminary hearing.
 - C. Trial counsel failed to introduce Williams's prior testimony.
 - D. Trial counsel failed to impeach the testimony of Chief Deputy District Attorney David Schwartz.
 - E. Trial counsel failed to object to the testimony of Detective Scholl.
 - F. Trial counsel failed to object to Deputy District Attorney Kephart becoming a witness in the case.
 - G. Trial counsel failed to investigate Wayne Porretti.
 - H. Trial counsel failed to impeach Todd Smith with available evidence.

- I. Trial counsel failed to introduce prior inconsistent statements of Todd Smith, Chad Simpson, and Billy Simpson as substantive evidence.
- J. Trial counsel failed to introduce prior inconsistent statements of Billy Simpson as substantive evidence.
- K. Trial counsel failed to introduce inconsistent statements of Chad Simpson as substantive evidence.
- L. Trial counsel failed to introduce inconsistent statements of Todd Smith as substantive evidence.
- M. Trial counsel failed to interview Lorelee Silvey and present her testimony.
- N. Trial counsel failed to request jury instructions on voluntary intoxication.
- O. Trial counsel failed to object to victim impact testimony presented in the guilt phase of the trial.
- P. Trial counsel failed to challenge potential jurors for implied bias.
- Q. Trial counsel failed to object to the trial court's biased questioning for rehabilitation of prospective jurors.
- R. Trial counsel failed to object to prosecutorial misconduct.
- S. Trial counsel failed to object to inaccurate or incomplete jury instructions.
- T. Trial counsel failed to adequately prepare or advise Byford regarding testifying at the 1994 trial.
- U. Trial counsel failed to advise Byford of Williams's December 10, 1992, voluntary statement to the police.
- V. Trial counsel failed to object to equal consideration of death penalty as qualification.
- W. Trial counsel failed to ensure that all proceedings were recorded.
- X. Trial counsel failed to object to Byford's absence from proceedings.
- Y. Trial counsel failed to object to popularly elected judges presiding over the trial and appellate proceedings.
- Z. Byford was prejudiced by the cumulative effect of the failures of his trial counsel alleged in Claim 1.

- 1 Claim 2. The prosecution failed to disclose material exculpatory
2 evidence regarding, and failed to correct false testimony of,
3 Wayne Porretti.
4
5 A. Porretti had an extensive criminal background, a history of
6 favorable plea deals, and he explicitly asked for a deal in this
7 case.
8
9 B. Porretti had documented mental health issues.
10
11 C. The prosecution failed to correct Porretti's false or
12 misleading testimony.
13
14 D. The prosecution failed to disclose all impeachment materials
15 regarding Porretti.
16
17 E. The State's history of such violations in other cases
18 suggests the violations in this case were willful.
19
20 Claim 3. The trial court allowed a deputy district attorney to vouch for
21 the testimony of Smith by testifying about why Smith was
22 given a plea deal.
23
24 Claim 4. The prosecution committed misconduct.
25
26 A. Prosecutor William Kephart has a history of misconduct.
27
28 B. Byford's conviction after his first trial was reversed due to
Kephart's misconduct.
C. The prosecution committed misconduct in the guilt phase of
the trial.
1. The prosecution made misleading statements during
their opening statements.
2. The prosecution made misleading statements during
their closing arguments.
3. The prosecution made improper references to prior
criminal activity on the part of Byford.
4. The prosecution improperly implied that Byford
carried a burden of proof.
5. The prosecution made degrading comments about
defense counsel and improperly vouched for
government witnesses.
6. The prosecution made disparaging comments about
defense counsel and mischaracterized the defense's
argument.
7. The prosecution made misleading argument.
8. Additional guilt phase prosecutorial misconduct.

1 D. The prosecution committed misconduct in the penalty phase
2 of the trial.

3 1. The prosecution improperly appealed to the passions
4 and prejudices of the jury.

5 2. The prosecution improperly argued that the jury
6 should impose the death penalty for its deterrent
7 effect.

8 3. The prosecution made improper arguments regarding
9 mercy and facts not in evidence.

10 4. The prosecution improperly compared the rights of
11 the victim to the rights of Byford.

12 5. The prosecution made false argument concerning
13 narrowing of aggravating circumstances.

14 6. The prosecution made improper assertions of
15 prosecutorial expertise and improperly shifted blame
16 for imposition of the death penalty.

17 7. The prosecution improperly offered personal opinion.

18 8. The prosecution improperly offered personal opinion
19 degrading to Byford's family.

20 9. The prosecution made improper arguments regarding
21 threats of harm to jurors.

22 10. The prosecution made argument misstating the law
23 concerning the aggravating circumstance of torture.

24 11. The prosecution made improper arguments regarding
25 moral outrage.

26 12. The prosecution made improper arguments regarding
27 good quality of life in prison and facts not in evidence.

28 13. The prosecution made erroneous arguments
concerning mercy and mitigating circumstances.

14. The prosecution made erroneous arguments
regarding lesser sentences.

15. The prosecution made misleading argument
conflating Byford with co-defendant Williams.

16. The prosecution made improper argument regarding
future dangerousness.

E. Byford was prejudiced by the cumulative effect of the
prosecutorial misconduct alleged in Claim 4.

1 Claim 5. The trial court gave the jurors erroneous instructions in the
2 guilt phase of the trial.

3 A. The jurors received erroneous instructions on aiding and
4 abetting.

5 B. The jurors received an erroneous instruction on
6 premeditation and deliberation.

7 C. The jurors received an erroneous instruction on reasonable
8 doubt.

9 D. The jurors received an erroneous instruction on implied
10 malice.

11 E. The jurors received an erroneous instruction on equal and
12 exact justice.

13 F. The jurors received an erroneous instruction on guilt or
14 innocence of another person.

15 G. The jurors receive an incomplete accomplice instruction.

16 H. Byford was prejudiced by the cumulative effect of the
17 erroneous instructions alleged in Claim 5.

18 Claim 6. The trial court improperly admitted Byford's testimony from
19 his first trial.

20 Claim 7. The trial court refused to sever Byford's case from that of his
21 co-defendant.

22 A. The failure to sever prejudiced Byford because it created a
23 serious risk the jury would be unable to make a reliable
24 judgment about Byford's guilt.

25 B. The jury instructions were insufficient to ensure the jury
26 would properly consider and compartmentalize the evidence
27 against each defendant.

28 Claim 8. Byford's right to a speedy trial was violated.

Claim 9. The torture or mutilation aggravating circumstance found by
the jury was invalid.

A. Procedural background.

B. The mutilation aggravating circumstance is unconstitutionally
vague and overbroad and does not narrow the application of
the death penalty.

C. The torture theory is constitutionally invalid.

D. Imputing to Byford an aggravating circumstance applicable
only to co-defendant Williams violated Byford's constitutional
rights.

1 E. The torture or mutilation factor is invalid due to the lack of
2 unanimous finding as to either theory of the factor.

3 F. Prejudice.

4 Claim 10. The aggravating circumstance of “under sentence of
imprisonment” is invalid as applied to Byford.

5 Claim 11. Trial counsel was ineffective in the penalty phase.

6 A. Penalty phase evidence presented.

7 B. Trial counsel failed to adequately investigate, develop and
8 prepare a case in mitigation.

9 C. Trial counsel failed to adequately present mitigation
evidence.

10 1. Trial counsel performed deficiently regarding
11 utilization of Dr. Thomas Kinsora.

12 2. Trial counsel failed to present mitigating evidence
13 regarding the ill effects of the drug and crime infested
Las Vegas neighborhood environment in which Byford
was raised.

14 3. Trial counsel failed to present mitigating evidence
15 regarding Byford’s dysfunctional, abusive home
environment.

16 4. Trial counsel failed to present mitigating evidence
17 regarding Byford’s family history of substance abuse
and addiction.

18 5. Trial counsel failed to present mitigating evidence
19 regarding the deleterious effects of being a child of an
alcoholic.

20 6. Trial counsel failed to adequately present mitigating
21 evidence regarding Byford’s own problems with
substance abuse and addiction and its damaging
22 effects on his development.

23 7. Trial counsel failed to adequately present mitigating
evidence regarding Byford’s intoxication on the night
24 of the offense.

25 8 Trial counsel failed to adequately present mitigating
evidence of Byford’s good character, and evidence
26 that the offense was inconsistent with his character.

27 D. Trial counsel failed to object to the aggravating circumstance
28 of “under sentence of imprisonment.”

1 E. Trial counsel failed to object on all available grounds to the
2 aggravating circumstance that the murder involved torture or
3 mutilation of the victim.

4 F. Trial counsel failed to object to the commutation instruction.

5 G. Trial counsel failed to object to the jury instruction listing
6 mitigating circumstances that the defense did not assert, and
7 that were therefore irrelevant, and to the prosecution's
8 argument addressing the irrelevant mitigating circumstances.

9 H. Byford was prejudiced by the cumulative effect of the failures
10 of his trial counsel alleged in Claim 11.

11 Claim 12. The trial court erred in conducting jury voir dire.

12 A. The trial court imposed a requirement of equal consideration
13 of the death penalty.

14 B. The trial court excused for cause a potential juror
15 who could consider the death penalty, but who could not
16 provide equal consideration to the death penalty.

17 C. The trial court denied a challenge for cause against a juror.

18 D. The trial court demonstrated a lack of impartiality in its
19 rehabilitation of potential jurors during jury selection.

20 E. Byford was prejudiced by the trial court's errors in
21 conducting jury voir dire.

22 Claim 13. The trial court refused to instruct the jury on all the mitigating
23 circumstances asserted by the defense.

24 Claim 14. The trial court permitted the prosecution to make
25 misrepresentations to the jury and to argue improperly
26 about statutorily delineated mitigating circumstances, some
27 of which were irrelevant to the case and not proffered by the
28 defense.

Claim 15. The trial court admitted highly prejudicial and cumulative
irrelevant evidence.

A. The trial court admitted gruesome photographs into
evidence.

B. The trial court admitted into evidence maggots recovered
from the body of the victim.

Claim 16. The trial court failed to record bench conferences and
meetings in chambers.

Claim 17. Critical court proceedings were conducted without Byford
present.

1 Claim 18. One of the jurors did not meet the constitutional standard of impartiality.

2 Claim 19. The trial court gave the jurors erroneous instructions in the
3 penalty phase of the trial.

4 A. The jurors received an erroneous anti-sympathy instruction.

5 B. The jurors received an erroneous commutation instruction.

6 Claim 20. The jury failed to find clearly applicable mitigating
7 circumstances.

8 Claim 21. Character evidence was improperly used in the weighing
9 process for determining death-eligibility.

10 Claim 22. The elected officials who adjudicated Byford's trial, appeal
11 and state post-conviction petitions were biased.

12 A. Nevada Supreme Court justices and district court judges are
13 popularly elected and thus face the possibility of removal if
14 they make a controversial and unpopular decision.

15 Claim 23. Appellate counsel was ineffective for not raising on Byford's
16 direct appeal all the claims contained in Claims 3, 4B, 4C,
17 5A, 5C, 5E, 5F, 5G, 9, 10, 12, 14, 16, 17, 19B, 20, 22, 24, 25
18 and 26, and for not raising all the federal constitutional bases
19 for the claims that were asserted on Byford's direct appeal.

20 Claim 24. Execution by lethal injection is unconstitutional.

21 A. Nevada's lethal-injection protocol is unconstitutional.

22 1. Lethal injection is unconstitutional in all
23 circumstances.

24 2. Lethal injection in Nevada is unconstitutional.

25 a. The use of a paralytic in the execution protocol
26 is unconstitutional.

27 b. The use of Midazolam in the execution protocol
28 is unconstitutional.

3. Byford's challenge to Nevada's lethal-injection
scheme is cognizable.

B. Nevada's death-penalty scheme does not genuinely narrow
the class of persons eligible for the death penalty.

C. The death penalty is cruel and unusual.

D. It is unconstitutional to impose death on an individual under
the age of twenty-one at the time of his crime.

1. The emerging medical and societal consensus.

2. Other courts and organizations recognize a consensus against executing those under twenty-one.
3. Byford should be categorically exempted from execution.
4. There is now a national consensus to abolish the death penalty.
5. Nevada's death-penalty scheme is unconstitutional because executive clemency is unavailable.

E. Execution in a manner that violates the constitution is prejudicial per se.

Claim 25. The Nevada Supreme Court failed to conduct fair and adequate appellate review.

Claim 26. The trial court's failure to give a jury instruction defining the standard of proof as beyond a reasonable doubt in the weighing stage of Byford's penalty hearing violated his federal constitutional rights.

Claim 27. Byford was prejudiced by the cumulative effect of the errors alleged in his third amended habeas petition.

A. The Nevada Supreme Court found numerous errors occurred at Byford's trial and sentencing.

Id.

Respondents filed their motion to dismiss on September 25, 2020 (ECF No. 107). Byford filed an opposition (ECF No. 116), and Respondents filed a reply (ECF No. 129). With his opposition to the motion to dismiss, Byford filed a motion for leave to conduct discovery (ECF Nos. 117, 121) and a motion for evidentiary hearing (ECF No. 119). Those motions have been fully briefed as well (ECF Nos. 130, 131, 133, 134).

III. DISCUSSION

A. Exhaustion and Procedural Default

A federal court will not grant a state prisoner's petition for a writ of habeas corpus unless the petitioner has exhausted his available state-court remedies. 28 U.S.C. § 2254(b); *see also Rose v. Lundy*, 455 U.S. 509 (1982). This means that a petitioner must give the state courts a fair opportunity to act on each of his claims before he presents those claims in a federal habeas petition. *See O'Sullivan v. Boerckel*, 526 U.S.

1 838, 844 (1999). A claim remains unexhausted until the petitioner has given the highest
2 available state court the opportunity to consider the claim through direct appeal or state
3 collateral review proceedings. See *Casey v. Byford*, 386 F.3d 896, 916 (9th Cir. 2004);
4 *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

5 A habeas petitioner must “present the state courts with the same claim he urges
6 upon the federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). To achieve
7 exhaustion, the state court must be “alerted to the fact that the prisoner [is] asserting
8 claims under the United States Constitution” and given the opportunity to correct alleged
9 violations of the prisoner’s federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995);
10 see *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). 28 U.S.C. § 2254(b)
11 “provides a simple and clear instruction to potential litigants: before you bring any claims
12 to federal court, be sure that you first have taken each one to state court.” *Jiminez v.*
13 *Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose*, 455 U.S. at 520).

14 A claim is not exhausted unless the petitioner has presented to the state court
15 the same operative facts and legal theory upon which his federal habeas claim is based.
16 See *Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The
17 exhaustion requirement is not met when the petitioner presents to the federal court facts
18 or evidence which place the claim in a significantly different posture than it was in the
19 state courts, or where different facts are presented at the federal level to support the
20 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988). On the other
21 hand, new allegations that do not “fundamentally alter the legal claim already
22 considered by the state courts” will not render a claim unexhausted. *Vasquez v.*
23 *Hillery*, 474 U.S. 254, 260 (1986); see also *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th
24 Cir. 1994).

25 The Supreme Court has recognized that under certain circumstances it may be
26 appropriate for a federal court to anticipate a state-law procedural bar of an
27 unexhausted claim, and to treat such a claim as technically exhausted but subject to the
28 procedural default doctrine. “An unexhausted claim will be procedurally defaulted, if

1 state procedural rules would now bar the petitioner from bringing the claim in state
2 court.” *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014) (citing *Coleman v.*
3 *Thompson*, 501 U.S. 722, 731 (1991)).

4 In light of the procedural history of this case, and, in particular, the Nevada
5 Supreme Court’s rulings in Byford’s second and third state habeas actions, the Court
6 determines that any claims not yet presented by Byford in state court would be ruled
7 procedurally barred in state court if Byford were to return to state court to attempt to
8 exhaust those claims. See Order of Affirmance, Exh. 38 (ECF No. 109-10) (Nevada
9 Supreme Court ruling Byford’s second state habeas action procedurally barred); Order
10 of Affirmance, Exh. 49 (ECF No. 109-21) (Nevada Supreme Court ruling Byford’s third
11 state habeas action procedurally barred). Therefore, the anticipatory default doctrine
12 applies to any claims not yet presented in state court, and the Court considers those
13 claims to be technically exhausted but subject to the procedural default doctrine. See
14 *Dickens*, 740 F.3d at 1317; see also Opposition to Motion to Dismiss (ECF No. 116),
15 p. 24 n.17 (“[T]he State’s position is apparently that, to the extent any of Byford’s
16 allegations are considered unexhausted claims, this Court should treat them as
17 technically exhausted (because there is no longer any available means by which the
18 state courts could review the merits of the claims) but procedurally defaulted. As such,
19 the exhaustion doctrine is a non-issue.”). The Court therefore determines that all the
20 claims in Byford’s third amended petition are either exhausted or technically exhausted
21 but subject to the procedural default doctrine.

22 Turning to the procedural default doctrine, then, a federal court will not review a
23 claim for habeas corpus relief if the decision of the state court denying the claim
24 rested—or, in the case of a technically exhausted claim, would rest—on a state law
25 ground that is independent of the federal question and adequate to support the
26 judgment. *Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991). The Court in *Coleman*
27 stated the effect of a procedural default as follows:
28

1 In all cases in which a state prisoner has defaulted his federal
2 claims in state court pursuant to an independent and adequate state
3 procedural rule, federal habeas review of the claims is barred unless the
prisoner can demonstrate cause for the default and actual prejudice as a
result of the alleged violation of federal law, or demonstrate that failure to
consider the claims will result in a fundamental miscarriage of justice.

4 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986).

5 A state procedural bar is “independent” if the state court explicitly invokes the
6 procedural rule as a separate basis for its decision. *McKenna v. McDaniel*, 65 F.3d
7 1483, 1488 (9th Cir. 1995). A state court’s decision is not “independent” if the
8 application of a state’s default rule depends on a consideration of federal law. *Park v.*
9 *California*, 202 F.3d 1146, 1152 (9th Cir. 2000). Also, if the state court’s decision fails
10 “to specify which claims were barred for which reasons,” the Ninth Circuit has held that
11 the ambiguity may serve to defeat the independence of the state procedural bar. *Valerio*
12 *v. Crawford*, 306 F.3d 742, 775 (9th Cir. 2002); *Koerner v. Grigas*, 328 F.3d 1039, 1050
13 (9th Cir. 2003).

14 A state procedural rule is “adequate” if it is “clear, consistently applied, and well-
15 established at the time of the petitioner’s purported default.” *Calderon v. United States*
16 *Dist. Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (citation and internal quotation
17 marks omitted). A discretionary state procedural rule can serve as an adequate ground
18 to bar federal habeas review because, even if discretionary, it can still be “firmly
19 established” and “regularly followed.” *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009). Also,
20 a rule is not automatically inadequate “upon a showing of seeming inconsistencies”
21 given that a state court must be allowed discretion “to avoid the harsh results that
22 sometimes attend consistent application of an unyielding rule.” *Walker v. Martin*, 562
23 U.S. 307, 320 (2011).

24 In *Bennett v. Mueller*, 322 F.3d 573, 585–86 (9th Cir. 2003), the court of appeals
25 established a burden-shifting test for analyzing adequacy. Under *Bennett*, the State
26 carries the initial burden of adequately pleading “the existence of an independent and
27 adequate state procedural ground as an affirmative defense.” *Bennett*, 322 F.3d at 586.
28 The burden then shifts to the petitioner “to place that defense in issue,” which the

1 petitioner may do “by asserting specific factual allegations that demonstrate the
2 inadequacy of the state procedure, including citation to authority demonstrating
3 inconsistent application of the rule.” *Id.* Assuming the petitioner has met his burden, “the
4 ultimate burden” of proving the adequacy of the state bar rests with the State, which
5 must demonstrate “that the state procedural rule has been regularly and consistently
6 applied in habeas actions.” *Id.*

7 The Ninth Circuit Court of Appeals has held Nev. Rev. Stat. § 34.810 (regarding
8 successive petitions) to be inadequate to bar federal review in capital habeas cases.
9 *See Valerio*, 306 F.3d at 778, *Petrocelli v. Angelone*, 248 F.3d 877, 888 (9th Cir. 2001),
10 and *McKenna*, 65 F.3d at 1488–89. Byford’s reference to these holdings places the
11 adequacy of the bar in issue. The relevant dates in *McKenna* and *Petrocelli* were 1983
12 and 1985. *See McKenna*, 65 F.3d at 1487–88; *Petrocelli*, 248 F.3d at 886. The court in
13 *Valerio* found that the bar was inadequate as of 1990. *Valerio*, 306 F.3d at 778.
14 Respondents have “the burden of demonstrating that, since *Valerio*, state courts have
15 begun to regularly and consistently apply § 34.810 to habeas cases.” *Riley v. McDaniel*,
16 786 F.3d 719, 722 n.4 (9th Cir. 2015). *See also King v. LaMarque*, 464 F.3d 963, 967
17 (9th Cir. 2006). Respondents have not made such a showing; this Court determines that
18 § 34.810 is inadequate as a procedural bar for purposes of this case.

19 On the other hand, the Ninth Circuit Court of Appeals has held Nev. Rev. Stat.
20 §§ 34.726 (statute of limitations) and 34.800 (laches) to be adequate to support
21 application of the procedural default doctrine. *See Williams v. Filson*, 908 F.3d 546,
22 579–80 (9th Cir. 2018); *Ybarra v. McDaniel*, 656 F.3d 984, 990 (9th Cir. 2011); *Valerio*,
23 306 F.3d at 778; *Loveland v. Hatcher*, 231 F.3d 640, 643 (9th Cir. 2000). *Moran v.*
24 *McDaniel*, 80 F.3d 1261, 1268–70 (9th Cir. 1996). Byford does not place the adequacy
25 of those rules at issue. This Court determines that Nev. Rev. Stat. §§ 34.726 and
26 34.800 are adequate to support application of the procedural default doctrine in this
27 case.
28

1 To demonstrate cause for a procedural default, the petitioner must “show that
2 some objective factor external to the defense impeded” his efforts to comply with the
3 state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external
4 impediment must have prevented the petitioner from raising the claim. See *McCleskey*
5 *v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner
6 bears “the burden of showing not merely that the errors [complained of] constituted a
7 possibility of prejudice, but that they worked to his actual and substantial disadvantage,
8 infecting his entire [proceeding] with errors of constitutional dimension.” *White v. Lewis*,
9 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170
10 (1982).

11 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective
12 assistance of post-conviction counsel may serve as cause, to overcome the procedural
13 default of a claim of ineffective assistance of trial counsel. In *Martinez*, the Supreme
14 Court noted that it had previously held, in *Coleman*, that “an attorney’s negligence in a
15 postconviction proceeding does not establish cause” to excuse a procedural default.
16 *Martinez*, 566 U.S. at 15. The *Martinez* Court, however, “qualif[ied] *Coleman* by
17 recognizing a narrow exception: inadequate assistance of counsel at initial-review
18 collateral proceedings may establish cause for a prisoner’s procedural default of a claim
19 of ineffective assistance at trial.” *Id.* at 9. The Court described “initial-review collateral
20 proceedings” as “collateral proceedings which provide the first occasion to raise a claim
21 of ineffective assistance at trial.” *Id.* at 8.

22 Beyond the question of the adequacy of NRS §§ 34.726, 34.800, and 34.810, the
23 Court will not, in this order, address the remainder of the issues raised by the parties
24 concerning alleged procedural default of Byford’s claims. The question of prejudice
25 regarding alleged procedural defaults in this case is intertwined with the question of the
26 merits of the claims themselves, such that the remaining procedural default issues will
27 be better addressed in conjunction with the merits, after Respondents file an answer
28 and Byford a reply. The Court will deny Respondents’ motion to dismiss, to the extent it

1 is made on procedural default grounds, without prejudice to Respondents asserting their
2 procedural default defense in their answer.

3 The parties' further briefing regarding alleged procedural default of Byford's
4 claims—in Respondents' answer, Byford's reply, and any response by Respondents to
5 Byford's reply—should, as to each claim allegedly procedurally defaulted, explain if,
6 when, and where that claim, or a similar or related claim, was asserted in state court,
7 and explain whether the claim was ruled procedurally barred in state court, so as to
8 result in the procedural default of the claim in this action. The briefing should also
9 address any argument by Byford that he can overcome the procedural default. This
10 analysis should be set forth separately, in a clear, understandable manner, for each
11 claim allegedly procedurally defaulted. The parties' further briefing must also, of course,
12 address the merits of each of Byford's remaining claims.

13 B. Byford's Claim of Actual Innocence

14 In his opposition to the motion to dismiss, Byford argues that he can overcome
15 the procedural default of any of his claims by a showing that he is actually innocent of
16 first-degree murder and actually innocent with respect to imposition of the death
17 penalty. See Opposition to Motion to Dismiss (ECF No. 116), pp. 21–23.

18 A petitioner can overcome the procedural default of a claim, or a statute of
19 limitations bar of a claim, by showing that he is actually innocent. See *Schlup v. Delo*,
20 513 U.S. 298 (1995); see also *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013)
21 (application to limitations bar); *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) (actual
22 innocence with respect to death penalty). To demonstrate actual innocence under
23 *Schlup*, a petitioner must present “new reliable evidence—whether it be exculpatory
24 scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that
25 was not presented at trial.” *Schlup*, 513 U.S. at 324. Taking into account all the
26 evidence in the case, the petitioner “must show that it is more likely than not that no
27 reasonable juror would have convicted him in the light of the new evidence.” *McQuiggin*,
28 569 U.S. at 399 (quoting *Schlup*, 513 U.S. at 327); see also *Schlup*, 513 U.S. at 329 (“a

petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt”); *House v. Bell*, 547 U.S. 518, 538 (2006) (regarding evidence to be considered). “Based on this total record, the court must make a ‘probabilistic determination about what reasonable, properly instructed jurors would do.’” *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 329). “The Court’s function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.” *Id.* Meeting this standard “raise[s] sufficient doubt about [the petitioner’s] guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error,” warranting “a review of the merits of the constitutional claims[.]” *Schlup*, 513 U.S. at 317.

Byford argues that the record does not support a finding, and the jury did not properly find, that he intended to kill Monica Wilkins or that he in fact killed her. See Opposition to Motion to Dismiss (ECF No. 116), pp. 22–23. These arguments are based on the trial record and do not involve alleged new evidence; as such, they do not satisfy the requirements of *Schlup* to overcome a procedural default or limitations bar.

The only allegedly new evidence that Byford presents in support of his actual innocence argument is a declaration of Todd Smith dated June 11, 2019. See Declaration of Todd Smith, Exh. 124 (ECF No. 93-28). The declaration includes representations about Smith’s relationships with Byford, Williams and Wilkins; about Smith’s view of the character of Byford, Williams and Wilkins; about the drug use of Byford, Williams, Wilkins and himself; and about events that took place before and after Wilkins’ murder. See *id.* The portion of Smith’s declaration that concerns the actual murder of Wilkins is as follows:

13. Monica called later that night to ask us to pick her up from a 7-11. It was the idea of either, or both, Rob [Byford] and Chris [Williams] to drive out to Pabco Road that night to attend a bonfire party. I had no independent knowledge that a party was scheduled to take place that night, but I had attended bonfire parties at that location in the past. During

1 these parties the attendees all bring their own gas and wood to start
 2 individual fires, listen to music and party. The gasoline and wood in the car
 3 came from Chris and Rob. I don't know why the attorneys made a big deal
 4 about their presence at the scene of the incident, because no one went
 5 there with the intention to kill and burn anyone.

6 14. At some point during the drive, everyone got out of the vehicle
 7 to urinate, including Monica. Monica went off to a different area nearby for
 8 privacy and crouched down to relieve herself. As soon as she stood back
 9 up Chris pulled out his gun and began firing at her back. Monica held the
 10 back of her head, turned around, and looked at the blood on her hand.
 11 Then she asked Chris why he shot her. Chris then yelled "Because you're
 12 a bitch and I hate you," before shooting at her several more times. Monica
 13 then collapsed and did not seem to be moving. I was completely stunned
 14 by what I witnessed and was backing up towards my car. This is when
 15 Chris pointed the gun at me and asked if I was trying to leave them out
 16 there. Chris then threatened to shoot me, as well, if I tried to leave. Rob
 17 then took the gun and said "we have to make sure she's dead" and fired a
 18 couple of shots at her head. I then did what Rob and Chris instructed me
 19 to do and took part in trying to cover up the crime, out of fear for my life.
 20 Rob pretty much directed the cover up efforts, but I do not recall the
 21 specific details.

22 *Id.* at 3–4.

23 Byford makes no showing that this declaration is new evidence within the
 24 meaning of *Schlup*. "New" evidence is "relevant evidence that was either excluded or
 25 unavailable at trial." *Schlup*, 513 U.S. at 327–28; *see also Chestang v. Sisto*, 522
 26 F.App'x 389, 391 (9th Cir. 2013) (witness declaration was not sufficiently "new" to
 27 support claim of actual innocence because contents were within defendant's knowledge
 28 at time of trial and no explanation was given for not introducing it sooner).

Furthermore, this declaration is, on its face, self-serving and unreliable; Smith's
 declaration tends to deflect blame from himself and his friend, Byford, and assign blame
 to Williams.

Most importantly, though, the declaration does not show Byford to be actually
 innocent. Far from it. The declaration confirms that Smith heard Byford say "we have to
 make sure she's dead," and saw Byford shoot Wilkins twice in the head.

A *Schlup* gateway claim requires new reliable evidence of innocence. "To be
 credible, such a claim requires petitioner to support his allegations of constitutional error
 with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy
 eyewitness accounts, or critical physical evidence—that was not presented at trial."

Schlup, 513 U.S. at 324. “By enumerating the categories of evidence that could prove innocence, the Supreme Court made clear that less reliable kinds of evidence cannot support an actual innocence claim.” *Lee v. Lampert*, 653 F.3d 929, 945–46 (9th Cir. 2011) (en banc) (Kozinski, J., concurring). “Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record.” *House*, 547 U.S. at 538 (citing *Schlup*, 513 U.S. at 330). Smith’s 2019 declaration is not new, reliable evidence that, if presented at trial, would have raised a probability that no reasonable juror would have voted to convict Byford of first-degree murder or to sentence him to death.

C. Ripeness

Respondents argue in their motion to dismiss that one of Byford’s claims is unripe. See Motion to Dismiss (ECF No. 107), p. 26. The Court determines that this issue, like the remaining procedural default issues, is intertwined with the question of the merits of Byford’s claims, such that it will be better addressed in conjunction with the merits of the claims, after Respondents file and answer and Byford files a reply. The Court will deny the motion to dismiss, to the extent made on ripeness grounds, without prejudice to Respondents asserting that argument in their answer.

D. Statute of Limitations

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), the following statute of limitations, codified in 28 U.S.C. § 2244, applies to federal habeas corpus petitions:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the

1 Constitution or laws of the United States is removed, if the
 applicant was prevented from filing by such State action;

2 (C) the date on which the constitutional right asserted
 3 was initially recognized by the Supreme Court, if the right
 has been newly recognized by the Supreme Court and made
 4 retroactively applicable to cases on collateral review; or

5 (D) the date on which the factual predicate of the
 claim or claims presented could have been discovered
 6 through the exercise of due diligence.

7 28 U.S.C. § 2244(d)(1)(A-D).

8 The petitioner is entitled to statutory tolling of the limitations period while a
 9 “properly filed application for State post-conviction or other collateral review with respect
 10 to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). The AEDPA
 11 statute of limitations is also subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631,
 12 649 (2010).

13 In this case, the one-year AEDPA statute of limitations period began to run when
 14 the United States Supreme Court denied Byford’s petition for writ of certiorari on
 15 November 27, 2000. *See Byford*, 531 U.S. 1016 (2000); 28 U.S.C. §2244(d)(1)(A). The
 16 limitations period was tolled, under 28 U.S.C. § 2244(d)(2), from December 1, 2000, to
 17 January 31, 2011, while Byford’s first state habeas action was pending. *See* Petition for
 18 Writ of Habeas Corpus, Exh. 2 (ECF No. 108-2); Docket Entries, Exh. 24, p. 5 (ECF No.
 19 108-24, p. 6). Four days ran against the limitations period from November 27 to
 20 December 1, 2000, and the remaining 361 days of the limitations period began running
 21 on January 31, 2011, and ran out on January 27, 2012.

22 Byford’s second and third state habeas actions were both initiated after the
 23 expiration of the limitations period and had no statutory tolling effect. *See Jiminez*, 276
 24 F.3d at 482.

25 Byford’s original petition in this action, filed February 15, 2011 (ECF No. 1), and
 26 his first amended petition, filed January 3, 2012 (ECF No. 17) were timely filed under
 27 the statute of limitations, but his second amended petition, filed September 4, 2012
 28 (ECF No. 46), and his third amended petition, filed January 30, 2020 (ECF No. 92),

1 were filed well after the expiration of the limitations period. This is undisputed. See
2 Motion to Dismiss (ECF No. 107), pp. 4–5; Opposition to Motion to Dismiss (ECF No.
3 116), pp. 5–6; see also *Duncan v. Walker*, 533 U.S. 167, 181–82 (2001) (pendency of
4 federal habeas corpus action does not toll AEDPA limitations period). Therefore, for the
5 most part, the timeliness of Byford’s claims turns upon whether the claims in his third
6 amended petition relate back to the filing of either his original petition or his first
7 amended petition (the exceptions, regarding Claims 24D(1)–(4) and 26, are discussed
8 below). This, too, is undisputed. See Motion to Dismiss (ECF No. 107), p. 5 (“Byford
9 may ... avoid dismissal under the statute of limitations if he can carry his burden of
10 establishing ... that some of his claims relate back to one of his prior timely filed
11 petitions.”); Opposition to Motion to Dismiss (ECF No. 116), pp. 5–9; Reply in Support of
12 Motion to Dismiss (ECF No. 129), p. 2 (“...Byford can overcome the timeliness defense
13 in one of three ways: ... (3) showing that his claims relate back to a prior timely filed
14 petition.”).

15 In *Mayle v. Felix*, 545 U.S. 644 (2005), the Supreme Court held that “[s]o long as
16 the original and amended petitions state claims that are tied to a common core of
17 operative facts, relation back will be in order,” but “[a]n amended habeas petition ...
18 does not relate back (and thereby escape AEDPA’s one-year time limit) when it asserts
19 a new ground for relief supported by facts that differ in both time and type from those
20 the original pleading set forth.” *Mayle*, 545 U.S. at 650, 664.

21 In *Ross v. Williams*, 950 F.3d 1160 (9th Cir. 2020) (en banc), the Ninth Circuit
22 Court of Appeals held: “If a petitioner attempts to set out habeas claims by identifying
23 specific grounds for relief in an original petition and attaching a court decision that
24 provides greater detail about the facts supporting those claims, that petition can support
25 an amended petition’s relation back.” *Ross*, 950 F.3d at 1167 (citing *Dye v. Hofbauer*,
26 546 U.S. 1 (2005) (per curiam) and Fed. R. Civ. P. 10(c) and 15(c)(1)). The *Ross* court
27 stated further: “If an exhibit to the original petition includes facts unrelated to the
28

1 grounds for relief asserted in that petition, those facts were not ‘attempted to be set out’
2 in that petition and cannot form a basis for relation back.” *Id.* at 1168.

3 Determining “whether an amended petition relates back to an original petition
4 that relied on an appended written instrument to help set forth the facts on which it
5 based its claims” requires a two-step analysis. *Ross*, 950 F.3d at 1167. First, the court
6 must “determine what claims the amended petition alleges and what core facts underlie
7 those claims.” *Id.* Second, “for each claim in the amended petition,” the court must
8 examine “the body of the original petition and its exhibits” to see whether the pleading
9 set out or attempted to set out “a corresponding factual episode,” or “whether the claim
10 is instead supported by facts that differ in both time and type” from those in the original
11 petition. *Id.* Relation back does not require that the “facts in the original and amended
12 petitions be stated in the same level of detail.” *Ross*, 950 F.3d at 1168.

13 The Court construes Byford's original petition liberally because he filed that
14 pleading *pro se*. See *Ross*, 950 F.3d at 1173 n.19. The Court must “look to the contents
15 of a *pro se* filing rather than its form.” *Id.*

16 Byford's original petition, filed *pro se* (albeit apparently with some assistance
17 from the Federal Public Defender's office), included one ground for relief, in which
18 Byford stated:

19 I allege that my state court conviction and death sentence are
20 unconstitutional, in violation of my Fifth, Sixth, Eighth, and Fourteenth
21 Amendments, for all of the reasons stated in my direct appeal and state
22 post-conviction proceedings. See attached exhibits 1-17, which are
incorporated herein by reference. All grounds for relief included in this
petition have been raised to the Nevada Supreme Court.

23 Petition for Writ of Habeas Corpus (ECF No. 1), p. 3. The Court reads this as an attempt
24 by Byford to assert in his original petition in this case all the claims that he asserted
25 before the Nevada Supreme Court on his direct appeal and on the appeal in his first
26 state habeas action. Byford's pleading was not artful. Arguably, Byford should have
27 stated each of the claims separately on the form habeas petition itself; that, however, is
28 a matter of form. The Court considers the substance of Byford's original petition, not its

1 form. *See Ross*, 950 F.3d at 1173 n.19. It is plain to the Court that Byford meant to
 2 assert, and he gave sufficient notice to the respondents that he meant to assert, all the
 3 claims that he asserted before the Nevada Supreme Court on his direct appeal and on
 4 the appeal in his first state habeas action.

5 Among the exhibits attached to Byford's original petition and incorporated by
 6 reference were Byford's opening and reply briefs on his direct appeal to the Nevada
 7 Supreme Court (Exhs. 3 (ECF No. 1-3, pp. 8–116) and 4 (ECF No. 1-3, pp. 118–55));
 8 the opinion of the Nevada Supreme Court on Byford's direct appeal (Exh. 5 (ECF No. 1-
 9 3, pp. 157–99)); Byford's opening and reply briefs on the appeal in his first state habeas
 10 action (Exhs. 6 (ECF Nos. 1-4, 1-5), 7 (ECF No. 1-6, pp. 2–45), 9 (ECF No. 1-7), 10
 11 (ECF No. 1-8), 13 (ECF No. 1-10), 14 (ECF No. 1-11, pp. 2–24), 15 (ECF No. 1-11, pp.
 12 26–94), and 16 (ECF No. 1-12, pp. 2–19)); and the orders and opinions of the Nevada
 13 Supreme Court on the appeal in Byford's first state habeas action (Exhs. 8 (ECF No. 1-
 14 6, pp. 46–50), 11 (ECF No. 1-9, pp. 2–6), 12 (ECF No. 1-9, pp. 8–13), 17 (ECF No. 1-
 15 12, pp. 21–55)). Applying *Ross*, the Court looks to those exhibits to determine what
 16 facts Byford presented in his original petition in support of the claims he attempted to
 17 assert in that petition.

18 E. Analysis of Individual Claims

19 Claim 1A

20 In Claim 1A, Byford claims that his trial counsel was ineffective for failing to
 21 engage a firearms expert or a crime scene reconstructionist. Third Amended Habeas
 22 Petition (ECF No. 92), pp. 31–42.

23 Taking first the part of Claim 1A, regarding trial counsel's failure to engage a
 24 firearms expert, Byford asserted a somewhat similar claim on the appeal in his first state
 25 habeas action, and he incorporated the briefing asserting that claim into his timely
 26 original petition in this action. *See* Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
 27 Appellant's Opening Brief, Exh. 6, p. 15 (ECF No. 1-4, p. 34); Appellant's Reply Brief,
 28 Exh. 7, pp. 9–10 (ECF No. 1-6, pp. 19–20); Appellant's Opening Brief, Exh. 9, p. 18

(ECF No. 1-7, p. 38); Appellant's Reply Brief, Exh. 10, pp. 11–12 (ECF No. 1-8, pp. 22–23); Appellant's Opening Brief, Exh. 13, pp. 18–19 (ECF No. 1-10, pp. 45–46); Appellant's Supplemental Opening Brief, Exh. 14, p. 5 (ECF No. 1-11, p. 6); Appellant's Reply Brief, Exh. 15, pp. 13–14 (ECF No. 1-11, pp. 47–48). Byford also asserted a somewhat similar claim in his timely first amended habeas petition in this action. See Amended Petition for Writ of Habeas Corpus (ECF No. 17), pp. 20–26, 37. The Court determines that these claims, asserted in Byford's timely original and first amended petitions, share a common core of operative facts with Claim 1A that Byford's trial counsel was ineffective during the guilt phase of his trial for failing to engage a firearms expert; therefore, this part Claim 1A relates back to the timely original and first amended petitions and is not barred by the statute of limitations.

In making this determination—and in ruling on the question of the relation back of any of Byford's claims in this order—the Court expresses no opinion regarding whether the claim is barred by the procedural default doctrine, what evidence may be considered in this action in support of the claim, or, of course, whether the claim has any merit.

Turning to the part of Claim 1A regarding trial counsel's failure to engage a crime scene reconstruction expert, Byford asserted a somewhat similar claim on the appeal in his first state habeas action, and he incorporated the briefing asserting that claim into his timely original petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, p. 13 (ECF No. 1-4, p. 32); Appellant's Reply Brief, Exh. 7, pp. 7–8 (ECF No. 1-6, pp. 17–18); Appellant's Opening Brief, Exh. 9, pp. 15–16 (ECF No. 1-7, pp. 35–36); Appellant's Reply Brief, Exh. 10, pp. 8–9 (ECF No. 1-8, pp. 19–20); Appellant's Opening Brief, Exh. 13, pp. 14–15 (ECF No. 1-10, pp. 41–42); Appellant's Supplemental Opening Brief, Exh. 14, pp. 3–4 (ECF No. 1-11, pp. 4-5); Appellant's Reply Brief, Exh. 15, pp. 9–10 (ECF No. 1-11, pp. 43–44). The Court determines that this claim, asserted in Byford's timely original petition, shares a common core of operative facts with the claim in Claim 1A that Byford's trial counsel was ineffective during the guilt phase of his trial for failing to engage a crime scene

1 reconstruction expert; therefore, this part Claim 1A relates back to Byford's timely
2 original petition and is not barred by the statute of limitations.

3 Claim 1B

4 In Claim 1B, Byford claims that his trial counsel was ineffective for failing to retain
5 a medical expert or pathologist and for failing to impeach Dr. Sheldon Green's testimony
6 at trial with his previous testimony from the September 10, 1992, preliminary hearing.

7 Third Amended Habeas Petition (ECF No. 92), pp. 42–47.

8 Byford asserted somewhat similar claims on the appeal in his first state habeas
9 action, and he incorporated the briefing asserting those claims into his timely original
10 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
11 Appellant's Opening Brief, Exh. 6, pp. 15–17 (ECF No. 1-4, pp. 34–36); Appellant's
12 Reply Brief, Exh. 7, pp. 10–11 (ECF No. 1-6, pp. 20–21); Appellant's Opening Brief,
13 Exh. 9, pp. 19–20 (ECF No. 1-7, pp. 39–40); Appellant's Reply Brief, Exh. 10, pp. 12–13
14 (ECF No. 1-8, pp. 23–24); Appellant's Opening Brief, Exh. 13, pp. 19–21 (ECF No. 1-
15 10, pp. 46–48); Appellant's Supplemental Opening Brief, Exh. 14, p. 5 (ECF No. 1-11, p.
16 6); Appellant's Reply Brief, Exh. 15, pp. 15–16 (ECF No. 1-11, pp. 47–48). Byford also
17 asserted a somewhat similar claim in his timely first amended habeas petition in this
18 action. See Amended Petition for Writ of Habeas Corpus (ECF No. 17), pp. 23–25, 37.
19 The Court determines that these claims, asserted in Byford's timely original and first
20 amended petitions, share a common core of operative facts with Claim 1B; therefore,
21 Claim 1B relates back to the timely original and first amended petitions and is not barred
22 by the statute of limitations.

23 Claim 1C

24 In Claim 1C, Byford claims that his trial counsel was ineffective for failing to
25 introduce Williams's prior testimony. Third Amended Habeas Petition (ECF No. 92),
26 pp. 47–48.

27 Byford asserted a somewhat similar claim on the appeal in his first state habeas
28 action, and he incorporated the briefing asserting that claim into his timely original

petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 22–23 (ECF No. 1-4, pp. 41–42); Appellant's Reply Brief, Exh. 7, pp. 15–16 (ECF No. 1-6, pp. 25–26); Appellant's Opening Brief, Exh. 9, p. 29 (ECF No. 1-7, p. 48); Appellant's Reply Brief, Exh. 10, p. 19 (ECF No. 1-8, p. 30); Appellant's Opening Brief, Exh. 13, pp. 31–32 (ECF No. 1-10, pp. 58–59); Appellant's Supplemental Opening Brief, Exh. 14, p. 7 (ECF No. 1-11, p. 8); Appellant's Reply Brief, Exh. 15, pp. 24–26 (ECF No. 1-11, pp. 58–60). The Court determines that this claim, asserted in Byford's timely original petition, shares a common core of operative facts with Claim 1C; therefore, Claim 1C relates back to the timely original petition and is not barred by the statute of limitations.

Claim 1D

In Claim 1D, Byford claims that his trial counsel was ineffective for failing to impeach the testimony of Chief Deputy District Attorney David Schwartz. Third Amended Habeas Petition (ECF No. 92), pp. 48–50.

The Court determines that Byford did not, in either his timely original petition or his timely first amended petition, assert a claim sharing a common core of operative facts with Claim 1D. Therefore, Claim 1D does not relate back to either the original or first amended petition, and it is barred by the statute of limitations. Claim 1D will be dismissed on this ground.

Claim 1E

In Claim 1E, Byford claims that his trial counsel was ineffective for failing to object to the testimony of Detective Scholl. Third Amended Habeas Petition (ECF No. 92), pp. 50–51.

Byford asserted a somewhat similar claim on the appeal in his first state habeas action, and he incorporated the briefing asserting that claim into his timely original petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 23–24 (ECF No. 1-4, pp. 42–43); Appellant's Reply Brief, Exh. 7, p. 16 (ECF No. 1-6, p. 26); Appellant's Opening Brief, Exh. 9, pp.

31–32 (ECF No. 1-7, pp. 50–51); Appellant’s Reply Brief, Exh. 10, p. 20 (ECF No. 1-8, p. 31); Appellant’s Opening Brief, Exh. 13, pp. 33–34 (ECF No. 1-10, pp. 60–61); Appellant’s Supplemental Opening Brief, Exh. 14, p. 8 (ECF No. 1-11, p. 9); Appellant’s Reply Brief, Exh. 15, p. 27 (ECF No. 1-11, p. 61). The Court determines that this claim, asserted in Byford’s timely original petition, shares a common core of operative facts with Claim 1E; therefore, Claim 1E relates back to the timely original petition and is not barred by the statute of limitations.

Claim 1F

In Claim 1F, Byford claims that his trial counsel was ineffective for failing to object to Deputy District Attorney Kephart becoming a witness in the case. Third Amended Habeas Petition (ECF No. 92), pp. 51–53.

Byford asserted a somewhat similar claim on the appeal in his first state habeas action, and he incorporated the briefing asserting that claim into his timely original petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant’s Opening Brief, Exh. 6, p. 17 (ECF No. 1-4, p. 36); Appellant’s Reply Brief, Exh. 7, pp. 11–12 (ECF No. 1-6, pp. 21–22); Appellant’s Opening Brief, Exh. 9, pp. 20–22 (ECF No. 1-7, pp. 40–42); Appellant’s Reply Brief, Exh. 10, pp. 13–14 (ECF No. 1-8, pp. 24–25); Appellant’s Opening Brief, Exh. 13, pp. 21–22 (ECF No. 1-10, pp. 48–49); Appellant’s Supplemental Opening Brief, Exh. 14, p. 5 (ECF No. 1-11, p. 6); Appellant’s Reply Brief, Exh. 15, pp. 16–17 (ECF No. 1-11, pp. 50–51). The Court determines that this claim, asserted in Byford’s timely original petition, shares a common core of operative facts with Claim 1F; therefore, Claim 1F relates back to the timely original petition and is not barred by the statute of limitations.

Claim 1G

In Claim 1G, Byford claims that his trial counsel was ineffective for failing to investigate Wayne Porretti. Third Amended Habeas Petition (ECF No. 92), pp. 53–54.

Byford asserted a somewhat similar claim in his timely first amended habeas petition in this action. See Amended Petition for Writ of Habeas Corpus (ECF No. 17),

1 pp. 33–37. The Court determines that this claim, asserted in Byford’s timely first
2 amended petition, shares a common core of operative facts with Claim 1G; therefore,
3 Claim 1G relates back to the timely first amended petition and is not barred by the
4 statute of limitations.

5 Claim 1H

6 In Claim 1H, Byford claims that his trial counsel was ineffective failing to impeach
7 Todd Smith with available evidence. Third Amended Habeas Petition (ECF No. 92), pp.
8 54–63.

9 Byford asserted a somewhat similar claim in his timely first amended habeas
10 petition in this action. See Amended Petition for Writ of Habeas Corpus (ECF No. 17),
11 pp. 20–32, 37. The Court determines that this claim, asserted in Byford’s timely first
12 amended petition, shares a common core of operative facts with Claim 1H; therefore,
13 Claim 1H relates back to the timely first amended petition and is not barred by the
14 statute of limitations.

15 Claim 1I

16 In Claim 1I, Byford claims that his trial counsel was ineffective for failing to
17 introduce prior inconsistent statements of Todd Smith, Chad Simpson, and Billy
18 Simpson as substantive evidence. Third Amended Habeas Petition (ECF No. 92), p. 63.

19 Byford asserted a somewhat similar claim on the appeal in his first state habeas
20 action, and he incorporated the briefing asserting that claim into his timely original
21 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
22 Appellant’s Opening Brief, Exh. 6, pp. 20–21 (ECF No. 1-4, pp. 39–40); Appellant’s
23 Reply Brief, Exh. 7, pp. 14–15 (ECF No. 1-6, pp. 24–25); Appellant’s Opening Brief,
24 Exh. 9, pp. 25–27 (ECF No. 1-7, pp. 44–46); Appellant’s Reply Brief, Exh. 10, pp. 17–18
25 (ECF No. 1-8, pp. 28–29); Appellant’s Opening Brief, Exh. 13, pp. 27–29 (ECF No. 1-
26 10, pp. 54–56); Appellant’s Supplemental Opening Brief, Exh. 14, p. 7 (ECF No. 1-11, p.
27 8); Appellant’s Reply Brief, Exh. 15, pp. 22–23 (ECF No. 1-11, pp. 56–57). The Court
28 determines that this claim, asserted in Byford’s timely original petition, shares a

1 common core of operative facts with Claim 1I; therefore, Claim 1I relates back to the
2 timely original petition and is not barred by the statute of limitations.

3 Claim 1J

4 In Claim 1J, Byford claims that his trial counsel was ineffective for failing to
5 introduce prior inconsistent statements of Billy Simpson as substantive evidence. Third
6 Amended Habeas Petition (ECF No. 92), pp. 64–71.

7 Byford asserted a somewhat similar claim on the appeal in his first state habeas
8 action, and he incorporated the briefing asserting that claim into his timely original
9 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
10 Appellant's Opening Brief, Exh. 6, pp. 20–22 (ECF No. 1-4, pp. 39–41); Appellant's
11 Reply Brief, Exh. 7, pp. 14–15 (ECF No. 1-6, pp. 24–25); Appellant's Opening Brief,
12 Exh. 9, pp. 25–28 (ECF No. 1-7, pp. 44–47); Appellant's Reply Brief, Exh. 10, pp. 17–18
13 (ECF No. 1-8, pp. 28–29); Appellant's Opening Brief, Exh. 13, pp. 27–30 (ECF No. 1-
14 10, pp. 54–57); Appellant's Supplemental Opening Brief, Exh. 14, p. 7 (ECF No. 1-11, p.
15 8); Appellant's Reply Brief, Exh. 15, pp. 22–24 (ECF No. 1-11, pp. 56–58). The Court
16 determines that this claim, asserted in Byford's timely original petition, shares a
17 common core of operative facts with Claim 1J; therefore, Claim 1J relates back to the
18 timely original petition and is not barred by the statute of limitations.

19 Claim 1K

20 In Claim 1K, Byford claims that his trial counsel was ineffective for failing to
21 introduce inconsistent statements of Chad Simpson as substantive evidence. Third
22 Amended Habeas Petition (ECF No. 92), pp. 71–73.

23 Byford asserted a somewhat similar claim on the appeal in his first state habeas
24 action, and he incorporated the briefing asserting that claim into his timely original
25 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
26 Appellant's Opening Brief, Exh. 6, pp. 20–21 (ECF No. 1-4, pp. 39–40); Appellant's
27 Reply Brief, Exh. 7, pp. 14–15 (ECF No. 1-6, pp. 24–25); Appellant's Opening Brief,
28 Exh. 9, pp. 25–27 (ECF No. 1-7, pp. 44–46); Appellant's Reply Brief, Exh. 10, pp. 17–18

(ECF No. 1-8, pp. 28–29); Appellant’s Opening Brief, Exh. 13, pp. 27–29 (ECF No. 1-10, pp. 54–56); Appellant’s Supplemental Opening Brief, Exh. 14, p. 7 (ECF No. 1-11, p. 8); Appellant’s Reply Brief, Exh. 15, pp. 22–23 (ECF No. 1-11, pp. 56–57). The Court determines that this claim, asserted in Byford’s timely original petition, shares a common core of operative facts with Claim 1K; therefore, Claim 1K relates back to the timely original petition and is not barred by the statute of limitations.

Claim 1L

In Claim 1L, Byford claims that his trial counsel was ineffective for failing to introduce inconsistent statements of Todd Smith as substantive evidence. Third Amended Habeas Petition (ECF No. 92), pp. 73–75.

Byford asserted a somewhat similar claim on the appeal in his first state habeas action, and he incorporated the briefing asserting that claim into his timely original petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant’s Opening Brief, Exh. 6, pp. 20–21 (ECF No. 1-4, pp. 39–40); Appellant’s Reply Brief, Exh. 7, pp. 14–15 (ECF No. 1-6, pp. 24–25); Appellant’s Opening Brief, Exh. 9, pp. 25–27 (ECF No. 1-7, pp. 44–46); Appellant’s Reply Brief, Exh. 10, pp. 17–18 (ECF No. 1-8, pp. 28–29); Appellant’s Opening Brief, Exh. 13, pp. 27–29 (ECF No. 1-10, pp. 54–56); Appellant’s Supplemental Opening Brief, Exh. 14, p. 7 (ECF No. 1-11, p. 8); Appellant’s Reply Brief, Exh. 15, pp. 22–23 (ECF No. 1-11, pp. 56–57). The Court determines that this claim, asserted in Byford’s timely original petition, shares a common core of operative facts with Claim 1L; therefore, Claim 1L relates back to the timely original petition and is not barred by the statute of limitations.

Claim 1M

In Claim 1M, Byford claims that his trial counsel was ineffective for failing to interview Lorelee Silvey and present her testimony. Third Amended Habeas Petition (ECF No. 92), pp. 75–76.

Byford asserted a somewhat similar claim on the appeal in his first state habeas action, and he incorporated the briefing asserting that claim into his timely original

petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, p. 19 (ECF No. 1-4, p. 38); Appellant's Reply Brief, Exh. 7, p. 13 (ECF No. 1-6, p. 23); Appellant's Opening Brief, Exh. 9, p. 24 (ECF No. 1-7, p. 43); Appellant's Reply Brief, Exh. 10, p. 16 (ECF No. 1-8, p. 27); Appellant's Opening Brief, Exh. 13, p. 25 (ECF No. 1-10, p. 52); Appellant's Supplemental Opening Brief, Exh. 14, p. 6 (ECF No. 1-11, p. 7); Appellant's Reply Brief, Exh. 15, pp. 20–21 (ECF No. 1-11, pp. 54–55). The Court determines that this claim, asserted in Byford's timely original petition, shares a common core of operative facts with Claim 1M; therefore, Claim 1M relates back to the timely original petition and is not barred by the statute of limitations.

Claim 1N

In Claim 1N, Byford claims that his trial counsel was ineffective for failing to request jury instructions on voluntary intoxication. Third Amended Habeas Petition (ECF No. 92), pp. 76–77.

Byford asserted a somewhat similar claim on the appeal in his first state habeas action, and he incorporated the briefing asserting that claim into his timely original petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 24–25 (ECF No. 1-4, pp. 43–44); Appellant's Reply Brief, Exh. 7, pp. 16–17 (ECF No. 1-6, pp. 26–27); Appellant's Opening Brief, Exh. 9, pp. 32–33 (ECF No. 1-7, pp. 51–52); Appellant's Reply Brief, Exh. 10, pp. 20–21 (ECF No. 1-8, pp. 31–32); Appellant's Opening Brief, Exh. 13, pp. 34–35 (ECF No. 1-10, pp. 61–62); Appellant's Supplemental Opening Brief, Exh. 14, p. 8 (ECF No. 1-11, p. 9); Appellant's Reply Brief, Exh. 15, pp. 27–28 (ECF No. 1-11, pp. 61–62). The Court determines that this claim, asserted in Byford's timely original petition, shares a common core of operative facts with Claim 1N; therefore, Claim 1N relates back to the timely original petition and is not barred by the statute of limitations.

1 Claim 1O

2 In Claim 1O, Byford claims that his trial counsel was ineffective for failing to object
3 to victim impact testimony presented in the guilt phase of the trial. Third Amended Habeas
4 Petition (ECF No. 92), pp. 77–78.

5 Byford asserted a somewhat similar claim on the appeal in his first state habeas
6 action, and he incorporated the briefing asserting that claim into his timely original
7 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
8 Appellant’s Opening Brief, Exh. 6, pp. 17–18 (ECF No. 1-4, pp. 36–37); Appellant’s
9 Reply Brief, Exh. 7, p. 12 (ECF No. 1-6, p. 22); Appellant’s Opening Brief, Exh. 9, pp.
10 22–23 (ECF No. 1-7, pp. 42–43); Appellant’s Reply Brief, Exh. 10, p. 14 (ECF No. 1-8,
11 p. 25); Appellant’s Opening Brief, Exh. 13, pp. 22–23 (ECF No. 1-10, pp. 49–50);
12 Appellant’s Supplemental Opening Brief, Exh. 14, pp. 5–6 (ECF No. 1-11, pp. 6–7);
13 Appellant’s Reply Brief, Exh. 15, pp. 17–18 (ECF No. 1-11, pp. 51–52). The Court
14 determines that this claim, asserted in Byford’s timely original petition, shares a
15 common core of operative facts with Claim 1O; therefore, Claim 1O relates back to the
16 timely original petition and is not barred by the statute of limitations.

17 Claim 1P

18 In Claim 1P, Byford claims that his trial counsel was ineffective for failing to
19 challenge potential jurors for implied bias. Third Amended Habeas Petition (ECF No. 92),
20 pp. 79–83.

21 Byford asserted a somewhat similar claim on the appeal in his first state habeas
22 action, and he incorporated the briefing asserting that claim into his timely original
23 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
24 Appellant’s Opening Brief, Exh. 6, pp. 9–11 (ECF No. 1-4, pp. 28–30); Appellant’s Reply
25 Brief, Exh. 7, pp. 5–7 (ECF No. 1-6, pp. 15–17); Appellant’s Opening Brief, Exh. 9, pp.
26 11–12 (ECF No. 1-7, pp. 31–32); Appellant’s Reply Brief, Exh. 10, pp. 7–8 (ECF No. 1-
27 8, pp. 18–19); Appellant’s Opening Brief, Exh. 13, pp. 10–11 (ECF No. 1-10, pp. 37–
28 38); Appellant’s Supplemental Opening Brief, Exh. 14, p. 3 (ECF No. 1-11, p. 4);

1 Appellant's Reply Brief, Exh. 15, pp. 7–8 (ECF No. 1-11, pp. 41–42). The Court
2 determines that this claim, asserted in Byford's timely original petition, shares a
3 common core of operative facts with Claim 1P; therefore, Claim 1P relates back to the
4 timely original petition and is not barred by the statute of limitations.

5 Claim 1Q

6 In Claim 1Q, Byford claims that his trial counsel was ineffective for failing to object
7 to the trial court's biased questioning for rehabilitation of prospective jurors. Third
8 Amended Habeas Petition (ECF No. 92), pp. 83–87.

9 Byford asserted a somewhat similar claim on the appeal in his first state habeas
10 action, and he incorporated the briefing asserting that claim into his timely original
11 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
12 Appellant's Opening Brief, Exh. 6, pp. 7–8 (ECF No. 1-4, pp. 26–27); Appellant's Reply
13 Brief, Exh. 7, pp. 2–3 (ECF No. 1-6, pp. 12–13); Appellant's Opening Brief, Exh. 9, pp.
14 9–10 (ECF No. 1-7, pp. 29–30); Appellant's Reply Brief, Exh. 10, pp. 5–6 (ECF No. 1-8,
15 pp. 16–17); Appellant's Opening Brief, Exh. 13, pp. 8–9 (ECF No. 1-10, pp. 35–36);
16 Appellant's Supplemental Opening Brief, Exh. 14, pp. 2–3 (ECF No. 1-11, pp. 3–4);
17 Appellant's Reply Brief, Exh. 15, pp. 4–5 (ECF No. 1-11, pp. 38–39). The Court
18 determines that this claim, asserted in Byford's timely original petition, shares a
19 common core of operative facts with Claim 1Q; therefore, Claim 1Q relates back to the
20 timely original petition and is not barred by the statute of limitations.

21 Claim 1R

22 In Claim 1R, Byford claims that his trial counsel was ineffective for failing to object
23 to prosecutorial misconduct. Third Amended Habeas Petition (ECF No. 92), p. 88.

24 Byford asserted a somewhat similar claim on the appeal in his first state habeas
25 action, and he incorporated the briefing asserting that claim into his timely original
26 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
27 Appellant's Opening Brief, Exh. 6, pp. 29–42 (ECF No. 1-4, p. 48 – ECF No. 1-5, p. 12);
28 Appellant's Reply Brief, Exh. 7, pp. 18–24 (ECF No. 1-6, pp. 28–34); Appellant's

1 Opening Brief, Exh. 9, pp. 36–51 (ECF No. 1-7, pp. 55–70); Appellant’s Reply Brief,
2 Exh. 10, pp. 21–30 (ECF No. 1-8, pp. 32–41); Appellant’s Opening Brief, Exh. 13, pp.
3 39–56 (ECF No. 1-10, pp. 66–83); Appellant’s Supplemental Opening Brief, Exh. 14, pp.
4 8–9 (ECF No. 1-11, pp. 9–10); Appellant’s Reply Brief, Exh. 15, pp. 29–43 (ECF No. 1-
5 11, pp. 63–77). In addition, on his direct appeal, before the Nevada Supreme Court,
6 Byford asserted a claim that shares core operative facts with Ground 1R, and Byford
7 incorporated the briefing asserting that claim into his timely original petition in this
8 action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant’s Opening
9 Brief, Exh. 3, pp. 36–42 (ECF No. 1-3, pp. 55–61); Appellant’s Reply Brief, Exh. 4, pp.
10 8–10 (ECF No. 1-3, pp. 131–33). The Court determines that these claims, asserted in
11 Byford’s timely original petition, share a common core of operative facts with Claim 1R;
12 therefore, Claim 1R relates back to the timely original petition and is not barred by the
13 statute of limitations.

14 The Court recognizes that there are differences between the specific alleged
15 prosecutorial misconduct incorporated into Claim 1R and the specific prosecutorial
16 misconduct alleged in state court and incorporated into Byford’s original petition. While
17 the Court here determines that the shared core of operative facts is sufficient for
18 purposes of the statute of limitations, the Court recognizes that there may be issues
19 regarding possible procedural default of portions of this claim—and other claims in
20 which the presentation of the claim in this action differs from the presentation of the
21 claim in state court—to be resolved in conjunction with the merits of the claims.

22 Claim 1S

23 In Claim 1S, Byford claims that his trial counsel was ineffective for failing to object
24 to inaccurate or incomplete jury instructions. Third Amended Habeas Petition (ECF No.
25 92), pp. 88–89.

26 Byford asserted somewhat similar claims on the appeal in his first state habeas
27 action, and he incorporated the briefing asserting those claims into his timely original
28 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;

Appellant's Opening Brief, Exh. 6, pp. 25–29, 48 (ECF No. 1-4, pp. 44–48, ECF No. 1-5, p. 18); Appellant's Reply Brief, Exh. 7, pp. 17–18 (ECF No. 1-6, pp. 27–28); Appellant's Opening Brief, Exh. 9, pp. 33–36 (ECF No. 1-7, pp. 52–55); Appellant's Reply Brief, Exh. 10, p. 32 (ECF No. 1-8, p. 43); Appellant's Opening Brief, Exh. 13, pp. 35–39, 64 (ECF No. 1-10, pp. 62–66, 91); Appellant's Supplemental Opening Brief, Exh. 14, p. 8 (ECF No. 1-11, p. 9); Appellant's Reply Brief, Exh. 15, pp. 28–29 (ECF No. 1-11, pp. 62–63); Appellant's Supplemental Reply Brief, Exh. 16, pp. 7–10 (ECF No. 1-12, pp. 12–15). In addition, on his direct appeal before the Nevada Supreme Court, Byford asserted claims sharing core operative facts with Claim 1S, and Byford incorporated those claims from his direct appeal into his timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 3, pp. 62–73 (ECF No. 1-3, pp. 81–92); Appellant's Reply Brief, Exh. 4, pp. 18–20 (ECF No. 1-3, pp. 141–43). The Court determines that these claims, asserted in Byford's timely original petition, share a common core of operative facts with Claim 1S; therefore, Claim 1S relates back to the timely original petition and is not barred by the statute of limitations.

Claim 1T

In Claim 1T, Byford claims that his trial counsel was ineffective for failing to adequately prepare or advise Byford regarding testifying at the 1994 trial. Third Amended Habeas Petition (ECF No. 92), pp. 89–91.

Byford asserted a somewhat similar claim on the appeal in his first state habeas action, and he incorporated the briefing asserting that claim into his timely original petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, p. 14 (ECF No. 1-4, p. 7); Appellant's Opening Brief, Exh. 9, p. 16 (ECF No. 1-7, p. 36); Appellant's Reply Brief, Exh. 10, p. 9 (ECF No. 1-8, p. 20); Appellant's Opening Brief, Exh. 13, pp. 15–16 (ECF No. 1-10, pp. 42–43); Appellant's Supplemental Opening Brief, Exh. 14, p. 4 (ECF No. 1-11, p. 5); Appellant's Reply Brief, Exh. 15, pp. 10–11 (ECF No. 1-11, pp. 44–45). The Court determines that this claim, asserted in Byford's timely original petition, shares a common core of

operative facts with Claim 1T; therefore, Claim 1T relates back to the timely original petition and is not barred by the statute of limitations.

Claim 1U

In Claim 1U, Byford claims that his trial counsel was ineffective for failing to advise Byford of Williams's December 10, 1992, voluntary statement to the police. Third Amended Habeas Petition (ECF No. 92), pp. 91–93.

The Court determines that Byford did not, in either his timely original petition or his timely first amended petition, assert a claim sharing a common core of operative facts with Claim 1U. Therefore, Claim 1U does not relate back to either the original or first amended petition, and it is barred by the statute of limitations. Claim 1U will be dismissed on this ground.

Claim 1V

In Claim 1V, Byford claims that his trial counsel was ineffective for failing to object to equal consideration of death penalty as qualification. Third Amended Habeas Petition (ECF No. 92), p. 93.

Byford asserted a somewhat similar claim on the appeal in his first state habeas action, and he incorporated the briefing asserting that claim into his timely original petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 8–9 (ECF No. 1-4, pp. 27–28); Appellant's Reply Brief, Exh. 7, pp. 4–5 (ECF No. 1-6, pp. 14–15); Appellant's Opening Brief, Exh. 9, pp. 10–11 (ECF No. 1-7, pp. 30–31); Appellant's Reply Brief, Exh. 10, pp. 6–7 (ECF No. 1-8, pp. 17–18); Appellant's Opening Brief, Exh. 13, pp. 9–10 (ECF No. 1-10, pp. 36–37); Appellant's Supplemental Opening Brief, Exh. 14, p. 3 (ECF No. 1-11, p. 4); Appellant's Reply Brief, Exh. 15, pp. 5–7 (ECF No. 1-11, pp. 39–41). The Court determines that this claim, asserted in Byford's timely original petition, shares a common core of operative facts with the claim in Claim 1V; therefore, Claim 1V relates back to the timely original petition and is not barred by the statute of limitations.

1 Claim 1W

2 In Claim 1W, Byford claims that his trial counsel was ineffective for failing to
3 ensure all proceedings were recorded. Third Amended Habeas Petition (ECF No. 92),
4 pp. 94–96.

5 Byford asserted a somewhat similar claim on the appeal in his first state habeas
6 action, and he incorporated the briefing asserting that claim into his timely original
7 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
8 Appellant’s Opening Brief, Exh. 6, pp. 11–13 (ECF No. 1-4, pp. 30–32); Appellant’s
9 Reply Brief, Exh. 7, p. 7 (ECF No. 1-6, p. 17); Appellant’s Opening Brief, Exh. 9, pp. 12–
10 15 (ECF No. 1-7, pp. 32–35); Appellant’s Reply Brief, Exh. 10, p. 8 (ECF No. 1-8, p. 19);
11 Appellant’s Opening Brief, Exh. 13, pp. 11–14 (ECF No. 1-10, pp. 38–41); Appellant’s
12 Supplemental Opening Brief, Exh. 14, p. 3 (ECF No. 1-11, p. 4); Appellant’s Reply Brief,
13 Exh. 15, pp. 8–9 (ECF No. 1-11, pp. 42–43). The Court determines that this claim,
14 asserted in Byford’s timely original petition, shares a common core of operative facts
15 with Claim 1W; therefore, Claim 1W relates back to the timely original petition and is not
16 barred by the statute of limitations.

17 Claim 1X

18 In Claim 1X, Byford claims that his trial counsel was ineffective for failing to
19 object to Byford’s absence from proceedings. Third Amended Habeas Petition (ECF No.
20 92), p. 96.

21 Byford asserted a somewhat similar claim on the appeal in his first state habeas
22 action, and he incorporated the briefing asserting that claim into his timely original
23 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
24 Appellant’s Opening Brief, Exh. 6, pp. 11–13 (ECF No. 1-4, pp. 30–32); Appellant’s
25 Reply Brief, Exh. 7, p. 7 (ECF No. 1-6, p. 17); Appellant’s Opening Brief, Exh. 9, pp. 12–
26 15 (ECF No. 1-7, pp. 32–35); Appellant’s Reply Brief, Exh. 10, p. 8 (ECF No. 1-8, p. 19);
27 Appellant’s Opening Brief, Exh. 13, pp. 11–14 (ECF No. 1-10, pp. 38–41); Appellant’s
28 Supplemental Opening Brief, Exh. 14, p. 3 (ECF No. 1-11, p. 4); Appellant’s Reply Brief,

1 Exh. 15, pp. 8–9 (ECF No. 1-11, pp. 42–43). The Court determines that this claim,
2 asserted in Byford’s timely original petition, shares a common core of operative facts
3 with Claim 1X; therefore, Claim 1X relates back to the timely original petition and is not
4 barred by the statute of limitations.

5 Claim 1Y

6 In Claim 1Y, Byford claims that his trial counsel was ineffective for failing to
7 object to popularly elected judges presiding over the trial and appellate proceedings.
8 Third Amended Habeas Petition (ECF No. 92), p. 96.

9 The Court determines that Byford did not, in either his timely original petition or
10 his timely first amended petition, assert a claim sharing a common core of operative
11 facts with Claim 1Y. Therefore, Claim 1Y does not relate back to either the original or
12 first amended petition, and it is barred by the statute of limitations. Claim 1Y will be
13 dismissed on this ground.

14 Claim 1Z

15 In Claim 1Z, Byford claims that he was prejudiced by the cumulative effect of the
16 failures of his trial counsel alleged in Claim 1. Third Amended Habeas Petition (ECF No.
17 92), pp. 97–99. The Court determines that this claim of cumulative error is not barred by
18 the statute of limitations, as underlying claims upon which it is based are not barred.

19 Claim 2

20 In Claim 2, Byford claims that the prosecution failed to disclose material
21 exculpatory evidence regarding, and failed to correct false testimony of, Wayne Porretti.
22 Third Amended Habeas Petition (ECF No. 92), pp. 100–26. Claim 2 includes five
23 subparts—Claims 2A, 2B, 2C, 2D and 2E—but for purposes of this order, Claim 2 can
24 be considered in its entirety, as a single claim.

25 Byford asserted somewhat similar claims in his timely first amended habeas
26 petition in this action. See Amended Petition for Writ of Habeas Corpus (ECF No. 17),
27 pp. 33–37. Also, on the appeal in his first state habeas action, Byford asserted a claim
28 sharing core operative facts with Claim 2, and he incorporated that claim into his timely

1 original petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
2 Appellant's Supplemental Reply Brief, Exh. 16, pp. 10–13 (ECF No. 1-12, pp. 15–18.
3 The Court determines that these claims, asserted in Byford's timely original and first
4 amended petitions, share a common core of operative facts with Claim 2; therefore,
5 Claim 2 relates back to the timely original and first amended petitions and is not barred
6 by the statute of limitations.

7 Claim 3

8 In Claim 3, Byford claims that the trial court allowed a deputy district attorney to
9 vouch for the testimony of Smith by testifying about why Smith was given a plea deal.
10 Third Amended Habeas Petition (ECF No. 92), pp. 127–29.

11 On the appeal in his first state habeas action, Byford asserted a claim sharing
12 core operative facts with Claim 3, and he incorporated the briefing asserting that claim
13 into his timely original petition in this action. See Petition for Writ of Habeas Corpus
14 (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 23–24 (ECF No. 1-4, pp. 42–
15 43); Appellant's Reply Brief, Exh. 7, p. 16 (ECF No. 1-6, p. 26); Appellant's Opening
16 Brief, Exh. 9, pp. 29–31 (ECF No. 1-7, pp. 48–50); Appellant's Reply Brief, Exh. 10, pp.
17 19–20 (ECF No. 1-8, pp. 30–31); Appellant's Opening Brief, Exh. 13, pp. 32–33 (ECF
18 No. 1-10, pp. 59–60); Appellant's Supplemental Opening Brief, Exh. 14, pp. 7–8 (ECF
19 No. 1-11, pp. 8–9); Appellant's Reply Brief, Exh. 15, p. 26 (ECF No. 1-11, p. 60). The
20 Court determines that this claim, asserted in Byford's timely original petition, shares a
21 common core of operative facts with Claim 3; therefore, Claim 3 relates back to the
22 timely original petition and is not barred by the statute of limitations.

23 Claim 4

24 In Claim 4, Byford claims that the prosecution committed misconduct. Third
25 Amended Habeas Petition (ECF No. 92), pp. 130–82. Claim 4 includes numerous
26 subparts, but for purposes of this order Claim 4 can be considered in its entirety, as a
27 single claim.
28

1 On the appeal in his first state habeas action, Byford asserted claims sharing
2 core operative facts with Claim 4, and he incorporated the briefing asserting those
3 claims into his timely original petition in this action. See Petition for Writ of Habeas
4 Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 29–42 (ECF No. 1-4, p.
5 48 – ECF No. 1-5, p. 12); Appellant's Reply Brief, Exh. 7, pp. 18–24 (ECF No. 1-6, pp.
6 28–34); Appellant's Opening Brief, Exh. 9, pp. 36–51 (ECF No. 1-7, pp. 55–70);
7 Appellant's Reply Brief, Exh. 10, pp. 21–30 (ECF No. 1-8, pp. 32–41); Appellant's
8 Opening Brief, Exh. 13, pp. 39–57 (ECF No. 1-10, pp. 66–84); Appellant's Supplemental
9 Opening Brief, Exh. 14, pp. 8–9 (ECF No. 1-11, pp. 9–10); Appellant's Reply Brief, Exh.
10 15, pp. 29–43 (ECF No. 1-11, pp. 63–77). In addition, on his direct appeal, before the
11 Nevada Supreme Court, Byford asserted a claim that shares core operative facts with
12 Claim 4, and Byford incorporated the briefing asserting that claim into his timely original
13 petition in this action. See Appellant's Opening Brief, Exh. 3, pp. 36–42 (ECF No. 1-3,
14 pp. 55–61); Appellant's Reply Brief, Exh. 4, pp. 8–10 (ECF No. 1-3, pp. 131–33). The
15 Court determines that these claims, asserted in Byford's timely original petition, share a
16 common core of operative facts with Claim 4; therefore, Claim 4 relates back to the
17 timely original petition and is not barred by the statute of limitations.

18 Claim 5A

19 In Claim 5A, Byford claims that the jurors received erroneous instructions on
20 aiding and abetting. Third Amended Habeas Petition (ECF No. 92), pp. 183–95.

21 Byford asserted a claim sharing core operative facts with Claim 5A on the appeal
22 in his first state habeas action, and he incorporated the briefing asserting that claim into
23 his timely original petition in this action. See Petition for Writ of Habeas Corpus (ECF
24 No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 25–26 (ECF No. 1-4, pp. 44–45);
25 Appellant's Reply Brief, Exh. 7, pp. 17–18 (ECF No. 1-6, pp. 27–28); Appellant's
26 Supplemental Reply Brief, Exh. 16, pp. 7–10 (ECF No. 1-12, pp. 12–15). Also, Byford
27 asserted a somewhat similar claim in his timely first amended habeas petition in this
28 action. See Amended Petition for Writ of Habeas Corpus (ECF No. 17), pp. 47–50. The

1 Court determines that these claims, asserted in Byford's timely original and first
2 amended petitions, share a common core of operative facts with Claim 5A; therefore,
3 Claim 5A relates back to the timely original and first amended petitions and is not barred
4 by the statute of limitations.

5 Claim 5B

6 In Claim 5B, Byford claims that the jurors received an erroneous instruction on
7 premeditation and deliberation. Third Amended Habeas Petition (ECF No. 92), pp. 195–
8 203.

9 Byford asserted a claim sharing core operative facts with Claim 5B on the appeal
10 in his first state habeas action, and he incorporated the briefing asserting that claim into
11 his timely original petition in this action. See Petition for Writ of Habeas Corpus (ECF
12 No. 1), p. 3; Appellant's Supplemental Reply Brief, Exh. 16, pp. 4–7 (ECF No. 1-12, pp.
13 9–12). Also, Byford asserted a somewhat similar claim in his timely first amended
14 habeas petition in this action. See Amended Petition for Writ of Habeas Corpus (ECF
15 No. 17), pp. 7–10. Byford also asserted a somewhat similar claim on his direct appeal
16 before the Nevada Supreme Court, and he incorporated that claim into his timely
17 original petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
18 Appellant's Opening Brief, Exh. 3, pp. 64–70 (ECF No. 1-3, pp. 83–89); Appellant's
19 Reply Brief, Exh. 4, p. 19 (ECF No. 1-3, p. 142). The Court determines that these
20 claims, asserted in Byford's timely original and first amended petitions, share a common
21 core of operative facts with Claim 5B; therefore, Claim 5B relates back to the timely
22 original and first amended petitions and is not barred by the statute of limitations.

23 Claim 5C

24 In Claim 5C, Byford claims that the jurors received an erroneous instruction on
25 reasonable doubt. Third Amended Habeas Petition (ECF No. 92), pp. 203–06.

26 On the appeal in his first state habeas action, Byford asserted a claim sharing
27 core operative facts with Claim 5C, and he incorporated the briefing asserting that claim
28 into his timely original petition in this action. See Petition for Writ of Habeas Corpus

(ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 26–27 (ECF No. 1-4, pp. 45–46); Appellant's Opening Brief, Exh. 9, p. 33 (ECF No. 1-7, p. 52); Appellant's Opening Brief, Exh. 13, pp. 35–36 (ECF No. 1-10, pp. 62–63); Appellant's Supplemental Opening Brief, Exh. 14, p. 8 (ECF No. 1-11, p. 9); Appellant's Reply Brief, Exh. 15, pp. 28–29 (ECF No. 1-11, pp. 62–63). The Court determines that this claim, asserted in Byford's timely original petition, shares a common core of operative facts with Claim 5C; therefore, Claim 5C relates back to the timely original petition and is not barred by the statute of limitations.

Claim 5D

In Claim 5D, Byford claims that the jurors received an erroneous instruction on implied malice. Third Amended Habeas Petition (ECF No. 92), pp. 207–09.

Byford asserted a somewhat similar claim in his timely first amended habeas petition in this action. See Amended Petition for Writ of Habeas Corpus (ECF No. 17), pp. 5–6. Byford also asserted a somewhat similar claim on his direct appeal before the Nevada Supreme Court, and he incorporated his briefing asserting that claim into his timely original petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 3, pp. 62–63 (ECF No. 1-3, pp. 81–82); Appellant's Reply Brief, Exh. 4, p. 18 (ECF No. 1-3, p. 141). The Court determines that these claims, asserted in Byford's timely original and first amended petitions, share a common core of operative facts with Claim 5D; therefore, Claim 5D relates back to the timely original and first amended petitions and is not barred by the statute of limitations.

Claim 5E

In Claim 5E, Byford claims that the jurors received an erroneous instruction on equal and exact justice. Third Amended Habeas Petition (ECF No. 92), pp. 209–11.

On the appeal in his first state habeas action, Byford asserted a claim sharing core operative facts with Claim 5E, and he incorporated the briefing asserting that claim into his timely original petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, p. 27 (ECF No. 1-4, p. 46);

1 Appellant's Opening Brief, Exh. 9, pp. 33–34 (ECF No. 1-7, pp. 52–53); Appellant's
2 Opening Brief, Exh. 13, pp. 36–37 (ECF No. 1-10, pp. 63–64); Appellant's Supplemental
3 Opening Brief, Exh. 14, p. 8 (ECF No. 1-11, p. 9); Appellant's Reply Brief, Exh. 15, p. 29
4 (ECF No. 1-11, p. 63). The Court determines that this claim, asserted in Byford's timely
5 original petition, shares a common core of operative facts with Claim 5E; therefore,
6 Claim 5E relates back to the timely original petition and is not barred by the statute of
7 limitations.

8 Claim 5F

9 In Claim 5F, Byford claims that the jurors received an erroneous instruction on
10 guilt or innocence of another person. Third Amended Habeas Petition (ECF No. 92), pp.
11 211–13.

12 On the appeal in his first state habeas action, Byford asserted a claim sharing
13 core operative facts with Claim 5F, and he incorporated the briefing asserting that claim
14 into his timely original petition in this action. See Petition for Writ of Habeas Corpus
15 (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 27–28 (ECF No. 1-4, pp. 46–
16 47); Appellant's Opening Brief, Exh. 9, pp. 34–35 (ECF No. 1-7, pp. 53–54); Appellant's
17 Opening Brief, Exh. 13, pp. 37–38 (ECF No. 1-10, pp. 64–65); Appellant's Supplemental
18 Opening Brief, Exh. 14, p. 8 (ECF No. 1-11, p. 9); Appellant's Reply Brief, Exh. 15, p. 29
19 (ECF No. 1-11, p. 63). The Court determines that this claim, asserted in Byford's timely
20 original petition, shares a common core of operative facts with Claim 5F; therefore,
21 Claim 5F relates back to the timely original petition and is not barred by the statute of
22 limitations.

23 Claim 5G

24 In Claim 5G, Byford claims that the jurors received an incomplete accomplice
25 instruction. Third Amended Habeas Petition (ECF No. 92), pp. 213–14.

26 On the appeal in his first state habeas action, Byford asserted a claim sharing
27 core operative facts with Claim 5G, and he incorporated the briefing asserting that claim
28 into his timely original petition in this action. See Petition for Writ of Habeas Corpus

(ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 28–29 (ECF No. 1-4, pp. 47–48); Appellant's Opening Brief, Exh. 9, pp. 35–36 (ECF No. 1-7, pp. 54–55); Appellant's Opening Brief, Exh. 13, pp. 38–39 (ECF No. 1-10, pp. 65–66); Appellant's Supplemental Opening Brief, Exh. 14, p. 8 (ECF No. 1-11, p. 9); Appellant's Reply Brief, Exh. 15, p. 29 (ECF No. 1-11, p. 63). The Court determines that this claim, asserted in Byford's timely original petition, shares a common core of operative facts with Claim 5G; therefore, Claim 5G relates back to the timely original petition and is not barred by the statute of limitations.

Claim 5H

In Claim 5H, Byford claims that he was prejudiced by the cumulative effect of the instructional error alleged in Claims 5A–5G. Third Amended Habeas Petition (ECF No. 92), p. 214. The Court determines that this claim of cumulative error is not barred by the statute of limitations, as underlying claims upon which it is based are not barred.

Claim 6

In Claim 6, Byford claims that the trial court improperly admitted Byford's testimony from his first trial. Third Amended Habeas Petition (ECF No. 92), pp. 215–19.

Byford asserted claims sharing core operative facts with Claim 6 on his direct appeal before the Nevada Supreme Court, and he incorporated his briefing of those claims into his timely original petition in this case. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 3, pp. 49–57 (ECF No. 1-3, pp. 68–76); Appellant's Reply Brief, Exh. 4, pp. 13–15 (ECF No. 1-3, pp. 136–38). Byford also asserted claims sharing core operative facts with Claim 6 on his appeal in his first state habeas action, and he incorporated those claims, as well, into his timely original petition in this case. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, p. 14 (ECF No. 1-4, p. 33); Appellant's Reply Brief, Exh. 7, p. 8 (ECF No. 1-6, p. 18); Appellant's Opening Brief, Exh. 9, pp. 16–17 (ECF No. 1-7, pp. 36–37); Appellant's Reply Brief, Exh. 10, pp. 9–10 (ECF No. 1-8, pp. 20–21); Appellant's Opening Brief, Exh. 13, pp. 15–17 (ECF No. 1-10, pp. 42–44);

1 Appellant's Supplemental Opening Brief, Exh. 14, p. 4 (ECF No. 1-11, p. 5); Appellant's
2 Reply Brief, Exh. 15, pp. 10–12 (ECF No. 1-11, pp. 44–46). The Court determines that
3 these claims, asserted in Byford's timely original petition, share a common core of
4 operative facts with Claim 6; therefore, Claim 6 relates back to the timely original
5 petition and is not barred by the statute of limitations.

6 Claim 7

7 In Claim 7, Byford claims that the trial court refused to sever Byford's case from
8 that of his co-defendant. Third Amended Habeas Petition (ECF No. 92), pp. 220–28.
9 Claim 7 includes two subparts—Claims 7A and 7B—but for purposes of this order,
10 Claim 7 can be considered in its entirety, as a single claim.

11 Byford asserted a somewhat similar claim on his direct appeal before the Nevada
12 Supreme Court, and he incorporated his briefing of that claim into his timely original
13 petition in this case. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
14 Appellant's Opening Brief, Exh. 3, pp. 29–32 (ECF No. 1-3, pp. 48–51); Appellant's
15 Reply Brief, Exh. 4, pp. 4–5 (ECF No. 1-3, pp. 127–28). The Court determines that
16 claim, asserted in Byford's timely original petition, shares a common core of operative
17 facts with Claim 7; therefore, Claim 7 relates back to the timely original petition and is
18 not barred by the statute of limitations.

19 Claim 8

20 In Claim 8, Byford claims that his right to a speedy trial was violated. Third
21 Amended Habeas Petition (ECF No. 92), pp. 229–33.

22 Byford asserted a somewhat similar claim on his direct appeal before the Nevada
23 Supreme Court, and he incorporated his briefing of that claim into his timely original
24 petition in this case. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
25 Appellant's Opening Brief, Exh. 3, pp. 33–35 (ECF No. 1-3, pp. 52–54); Appellant's
26 Reply Brief, Exh. 4, pp. 6–7 (ECF No. 1-3, pp. 129–30). The Court determines that
27 claim, asserted in Byford's timely original petition, shares a common core of operative
28

1 facts with Claim 8; therefore, Claim 8 relates back to the timely original petition and is
2 not barred by the statute of limitations.

3 Claim 9

4 In Claim 9, Byford claims that the torture or mutilation aggravating circumstance
5 found by the jury was invalid. Third Amended Habeas Petition (ECF No. 92), pp. 234–
6 49. Claim 9 includes six subparts—Claims 9A, 9B, 9C, 9D, 9E and 9F—but for
7 purposes of this order, Claim 9 can be considered in its entirety, as a single claim.

8 Byford asserted a somewhat similar claim in his timely first amended habeas
9 petition in this action. See Amended Petition for Writ of Habeas Corpus (ECF No. 17),
10 pp. 51–55. Byford also asserted a somewhat similar claim on his direct appeal before
11 the Nevada Supreme Court, and he incorporated his briefing of that claim into his timely
12 original petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
13 Appellant’s Opening Brief, Exh. 3, pp. 80–89 (ECF No. 1-3, pp. 99–108); Appellant’s
14 Reply Brief, Exh. 4, pp. 24–25 (ECF No. 1-3, pp. 149–50). In addition, on the appeal in
15 his first state habeas action, Byford asserted claims sharing core operative facts with
16 Claim 9, and he incorporated his briefing of those claims into his timely original petition.
17 See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant’s Opening Brief,
18 Exh. 6, pp. 42–54 (ECF No. 1-5, pp. 12–24); Appellant’s Reply Brief, Exh. 7, pp. 24–28
19 (ECF No. 1-6, pp. 34–38); Appellant’s Opening Brief, Exh. 9, pp. 51–60 (ECF No. 1-7,
20 pp. 70–79); Appellant’s Reply Brief, Exh. 10, pp. 30–33 (ECF No. 1-8, pp. 41–44);
21 Appellant’s Opening Brief, Exh. 13, pp. 57–71 (ECF No. 1-10, pp. 84–98); Appellant’s
22 Supplemental Opening Brief, Exh. 14, p. 9 (ECF No. 1-11, p. 10); Appellant’s Reply
23 Brief, Exh. 15, pp. 43–50 (ECF No. 1-11, pp. 77–84). The Court determines that these
24 claims, asserted in Byford’s timely original and first amended petitions, share a common
25 core of operative facts with Claim 9; therefore, Claim 9 relates back to the timely original
26 and first amended petitions and is not barred by the statute of limitations.

1 Claim 10

2 In Claim 10, Byford claims that the aggravating circumstance of “under sentence
3 of imprisonment” is invalid as applied to him. Third Amended Habeas Petition (ECF No.
4 92), pp. 250–52.

5 On the appeal in his first state habeas action, Byford asserted a claim sharing
6 core operative facts with Claim 10, and he incorporated his briefing of that claim into his
7 timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
8 Appellant’s Opening Brief, Exh. 6, pp. 59–61 (ECF No. 1-5, pp. 29–31); Appellant’s
9 Opening Brief, Exh. 9, pp. 68–70 (ECF No. 1-7, pp. 87–89); Appellant’s Reply Brief,
10 Exh. 10, p. 36 (ECF No. 1-8, pp. 47); Appellant’s Opening Brief, Exh. 13, pp. 77–79
11 (ECF No. 1-10, pp. 104–06); Appellant’s Supplemental Opening Brief, Exh. 14, pp. 10–
12 11 (ECF No. 1-11, pp. 11–12); Appellant’s Reply Brief, Exh. 15, p. 53 (ECF No. 1-11, p.
13 87). The Court determines that this claim, asserted in Byford’s timely original petition,
14 shares a common core of operative facts with Claim 10; therefore, Claim 10 relates
15 back to the timely original petition and is not barred by the statute of limitations.

16 Claim 11A

17 In Claim 11, Byford claims that his trial counsel was ineffective in the penalty
18 phase. Third Amended Habeas Petition (ECF No. 92), pp. 253–97. Claim 11 includes
19 eight subparts—Claims 11A, 11B, 11C (which itself includes eight subparts), 11D, 11E,
20 11F, 11G and 11H. In Claim 11A, Byford summarizes the penalty phase evidence that
21 was presented. *Id.* at 253–56. The Court does not read Claim 11A to assert a
22 standalone claim, but rather to be background information to be considered with respect
23 to the other subparts of Claim 11.

24 Claims 11B and 11C

25 In Claim 11B, Byford claims that his trial counsel failed to adequately investigate,
26 develop and prepare a case in mitigation, and in Claim 11C, Byford identifies specific
27 mitigation evidence that he claims his trial counsel did not adequately present. Third
28 Amended Habeas Petition (ECF No. 92), pp. 256–95.

1 In his timely first amended petition, Byford asserted a claim sharing core
2 operative facts with Claims 11B and 11C. See Amended Petition for Writ of Habeas
3 Corpus (ECF No. 17), pp. 38–46. The Court determines that this claim, asserted in
4 Byford's timely first amended petition, shares a common core of operative facts with
5 Claims 11B and 11C; therefore, Claims 11B and 11C relate back to the timely first
6 amended petition and are not barred by the statute of limitations.

7 Claim 11D

8 In Claim 11D, Byford claims that his trial counsel failed to object to the
9 aggravating circumstance of “under sentence of imprisonment.” Third Amended Habeas
10 Petition (ECF No. 92), pp. 295–96.

11 On the appeal in his first state habeas action, Byford asserted a somewhat
12 similar claim, and he incorporated his briefing of that claim into his timely original
13 petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening
14 Brief, Exh. 6, pp. 59–61 (ECF No. 1-5, pp. 29–31); Appellant's Opening Brief, Exh. 9,
15 pp. 68–70 (ECF No. 1-7, pp. 87–89); Appellant's Reply Brief, Exh. 10, p. 36 (ECF No. 1-
16 8, pp. 47); Appellant's Opening Brief, Exh. 13, pp. 77–79 (ECF No. 1-10, pp. 104–06);
17 Appellant's Supplemental Opening Brief, Exh. 14, pp. 10–11 (ECF No. 1-11, pp. 11–12);
18 Appellant's Reply Brief, Exh. 15, p. 53 (ECF No. 1-11, p. 87). The Court determines that
19 this claim, asserted in Byford's timely original petition, shares a common core of
20 operative facts with Claim 11D; therefore, Claim 11D relates back to the timely original
21 petition and is not barred by the statute of limitations.

22 Claim 11E

23 In Claim 11E, Byford claims that his trial counsel failed to object on all available
24 grounds to the aggravating circumstance that the murder involved torture or mutilation
25 of the victim. Third Amended Habeas Petition (ECF No. 92), p. 296.

26 In his timely first amended petition, Byford asserted a claim sharing core
27 operative facts with Claim 11E. See Amended Petition for Writ of Habeas Corpus (ECF
28 No. 17), pp. 51–55. Also, on his direct appeal to the Nevada Supreme Court, Byford

1 asserted a claim sharing core operative facts with Claim 11E, and he incorporated his
2 briefing of that claim into his timely original petition in this action. See Petition for Writ of
3 Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 3, pp. 80–89 (ECF
4 No. 1-3, pp. 99–108); Appellant's Reply Brief, Exh. 4, pp. 24–25 (ECF No. 1-3, pp. 149–
5 50). In addition, on the appeal in his first state habeas action, Byford asserted claims
6 somewhat similar to Claim 11E, and he incorporated his briefing of those claims into his
7 timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
8 Appellant's Opening Brief, Exh. 6, pp. 42–54 (ECF No. 1-5, pp. 12–24); Appellant's
9 Reply Brief, Exh. 7, pp. 24–28 (ECF No. 1-6, pp. 34–38); Appellant's Opening Brief,
10 Exh. 9, pp. 51–60 (ECF No. 1-7, pp. 70–79); Appellant's Reply Brief, Exh. 10, pp. 30–33
11 (ECF No. 1-8, pp. 41–44); Appellant's Opening Brief, Exh. 13, pp. 57–71 (ECF No. 1-
12 10, pp. 84–98); Appellant's Supplemental Opening Brief, Exh. 14, p. 9 (ECF No. 1-11, p.
13 10); Appellant's Reply Brief, Exh. 15, pp. 43–50 (ECF No. 1-11, pp. 77–84). The Court
14 determines that these claims, asserted in Byford's timely original and first amended
15 petitions, share a common core of operative facts with Claim 11E; therefore, Claim 11E
16 relates back to the timely original and first amended petitions and is not barred by the
17 statute of limitations.

18 Claim 11F

19 In Claim 11F, Byford claims that his trial counsel failed to object to the
20 commutation instruction. Third Amended Habeas Petition (ECF No. 92), p. 297.

21 On the appeal in his first state habeas action, Byford asserted a claim somewhat
22 similar to Claim 11F, and he incorporated his briefing of that claim into his timely original
23 petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening
24 Brief, Exh. 6, p. 48 (ECF No. 1-5, p. 18); Appellant's Opening Brief, Exh. 9, pp. 56–57
25 (ECF No. 1-7, pp. 75–76); Appellant's Reply Brief, Exh. 10, p. 32 (ECF No. 1-8, p. 43);
26 Appellant's Opening Brief, Exh. 13, p. 64 (ECF No. 1-10, p. 91); Appellant's
27 Supplemental Opening Brief, Exh. 14, p. 9 (ECF No. 1-11, p. 10); Appellant's Reply
28 Brief, Exh. 15, p. 46 (ECF No. 1-11, p. 80). The Court determines that this claim,

1 asserted in Byford's timely original petition, shares a common core of operative facts
2 with Claim 11F; therefore, Claim 11F relates back to the timely original petition and is
3 not barred by the statute of limitations.

4 Claim 11G

5 In Claim 11G, Byford claims that his trial counsel failed to object to the jury
6 instruction listing mitigating circumstances that the defense did not assert, and that were
7 therefore irrelevant, and to the prosecution's argument addressing the irrelevant
8 mitigating circumstances. Third Amended Habeas Petition (ECF No. 92), p. 297.

9 On the appeal in his first state habeas action, Byford asserted a claim somewhat
10 similar to Claim 11G, and he incorporated his briefing of that claim into his timely
11 original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's
12 Opening Brief, Exh. 6, pp. 54–55 (ECF No. 1-5, pp. 24–25); Appellant's Opening Brief,
13 Exh. 9, pp. 62–64 (ECF No. 1-7, pp. 81–83); Appellant's Reply Brief, Exh. 10, pp. 34–35
14 (ECF No. 1-8, pp. 45–46); Appellant's Opening Brief, Exh. 13, pp. 71–72 (ECF No. 1-
15 10, pp. 98–99); Appellant's Supplemental Opening Brief, Exh. 14, pp. 9–10 (ECF No. 1-
16 11, pp. 10–11); Appellant's Reply Brief, Exh. 15, pp. 50–51 (ECF No. 1-11, pp. 84–85).
17 The Court determines that this claim, asserted in Byford's timely original petition, shares
18 a common core of operative facts with Claim 11G; therefore, Claim 11G relates back to
19 the timely original petition and is not barred by the statute of limitations.

20 Claim 11H

21 In Claim 11H, Byford claims that he was prejudiced by the cumulative effect of
22 the failures of his trial counsel alleged in Claim 11. Third Amended Habeas Petition
23 (ECF No. 92), p. 297. The Court determines that this claim of cumulative error is not
24 barred by the statute of limitations, as underlying claims upon which it is based are not
25 barred.

1 Claim 12A

2 In Claim 12A, Byford claims that the trial court imposed a requirement of equal
3 consideration of the death penalty. Third Amended Habeas Petition (ECF No. 92), pp.
4 298–302.

5 In his timely first amended petition, Byford asserted a somewhat similar claim.
6 See Amended Petition for Writ of Habeas Corpus (ECF No. 17), pp. 56–59. Also, on
7 Byford's appeal in his first state habeas action, he asserted a claim sharing core
8 operative facts with Claim 12A, and he incorporated his briefing of that claim into his
9 timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
10 Appellant's Opening Brief, Exh. 6, pp. 8–9 (ECF No. 1-4, pp. 27–28); Appellant's Reply
11 Brief, Exh. 7, pp. 4–5 (ECF No. 1-6, pp. 14–15); Appellant's Opening Brief, Exh. 9, pp.
12 10–11 (ECF No. 1-7, pp. 30–31); Appellant's Reply Brief, Exh. 10, pp. 6–7 (ECF No. 1-
13 8, pp. 17–18); Appellant's Opening Brief, Exh. 13, pp. 9–10 (ECF No. 1-10, pp. 36–37);
14 Appellant's Supplemental Opening Brief, Exh. 14, p. 3 (ECF No. 1-11, p. 4); Appellant's
15 Reply Brief, Exh. 15, pp. 5–7 (ECF No. 1-11, pp. 39–41). The Court determines that
16 these claims, asserted in Byford's timely original and first amended petitions, share a
17 common core of operative facts with Claim 12A; therefore, Claim 12A relates back to
18 the timely original and first amended petitions and is not barred by the statute of
19 limitations.

20 Claim 12B

21 In Claim 12B, Byford claims that the trial court excused for cause a potential juror
22 who could consider the death penalty, but who could not provide equal consideration to
23 the death penalty. Third Amended Habeas Petition (ECF No. 92), pp. 302–06.

24 In his timely first amended petition, Byford asserted a somewhat similar claim.
25 See Amended Petition for Writ of Habeas Corpus (ECF No. 17), pp. 60–63. Also, on
26 Byford's appeal in his first state habeas action, he asserted a claim sharing core
27 operative facts with Claim 12B, and he incorporated his briefing of that claim into his
28 timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;

Appellant's Opening Brief, Exh. 6, pp. 6–7 (ECF No. 1-4, pp. 25–26); Appellant's Reply Brief, Exh. 7, pp. 2–3 (ECF No. 1-6, pp. 12–13); Appellant's Opening Brief, Exh. 9, pp. 8–9 (ECF No. 1-7, pp. 28–29); Appellant's Reply Brief, Exh. 10, pp. 4–5 (ECF No. 1-8, pp. 15–16); Appellant's Opening Brief, Exh. 13, pp. 6–8 (ECF No. 1-10, pp. 33–35); Appellant's Supplemental Opening Brief, Exh. 14, p. 2 (ECF No. 1-11, p. 3); Appellant's Reply Brief, Exh. 15, pp. 2–3 (ECF No. 1-11, pp. 36–38). The Court determines that these claims, asserted in Byford's timely original and first amended petitions, share a common core of operative facts with Claim 12B; therefore, Claim 12B relates back to the timely original and first amended petitions and is not barred by the statute of limitations.

Claim 12C

In Claim 12C, Byford claims that the trial court denied a challenge for cause against a juror. Third Amended Habeas Petition (ECF No. 92), pp. 306–09.

In his timely first amended petition, Byford asserted a somewhat similar claim. See Amended Petition for Writ of Habeas Corpus (ECF No. 17), pp. 63–65. The Court determines that this claim, asserted in Byford's timely first amended petition, shares a common core of operative facts with Claim 12C; therefore, Claim 12C relates back to the timely first amended petition and is not barred by the statute of limitations.

Claim 12D

In Claim 12D, Byford claims that the trial court demonstrated a lack of impartiality in its rehabilitation of potential jurors during jury selection. Third Amended Habeas Petition (ECF No. 92), pp. 310–14.

On the appeal in his first state habeas action, Byford asserted a claim sharing core operative facts with Claim 12D, and he incorporated his briefing of that claim into his timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 7–8 (ECF No. 1-4, pp. 26–27); Appellant's Reply Brief, Exh. 7, pp. 3–4 (ECF No. 1-6, pp. 13–14); Appellant's Opening Brief, Exh. 9, pp. 9–10 (ECF No. 1-7, pp. 29–30); Appellant's Reply Brief, Exh. 10, pp. 5–6 (ECF No. 1-8,

1 pp. 16–17); Appellant’s Opening Brief, Exh. 13, pp. 8–9 (ECF No. 1-10, pp. 35–36);
2 Appellant’s Supplemental Opening Brief, Exh. 14, pp. 2–3 (ECF No. 1-11, pp. 3–4);
3 Appellant’s Reply Brief, Exh. 15, pp. 4–5 (ECF No. 1-11, pp. 38–39). The Court
4 determines that this claim, asserted in Byford’s timely original petition, shares a
5 common core of operative facts with Claim 12D; therefore, Claim 12D relates back to
6 the timely original petition and is not barred by the statute of limitations.

7 Claim 12E

8 In Claim 12E, Byford claims that he was prejudiced by the trial court’s errors in
9 conducting jury voir dire. Third Amended Habeas Petition (ECF No. 92), p. 314. The
10 Court does not read Claim 12E to assert a standalone claim, but rather to set forth
11 argument regarding Claims 12A, 12B, 12C and 12D.

12 Claim 13

13 In Claim 13, Byford claims that the trial court refused to instruct the jury on all the
14 mitigating circumstances asserted by the defense. Third Amended Habeas Petition
15 (ECF No. 92), pp. 315–18.

16 Byford asserted a somewhat similar claim on his direct appeal before the Nevada
17 Supreme Court, and he incorporated his briefing of that claim into his timely original
18 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
19 Appellant’s Opening Brief, Exh. 3, pp. 74–75 (ECF No. 1-3, pp. 93–94); Appellant’s
20 Reply Brief, Exh. 4, p. 21 (ECF No. 1-3, p. 144). Also, on the appeal in his first state
21 habeas action, Byford asserted a claim sharing core operative facts with Claim 13, and
22 he incorporated his briefing of that claim into his timely original petition. See Petition for
23 Writ of Habeas Corpus (ECF No. 1), p. 3; Appellant’s Opening Brief, Exh. 6, pp. 55–56
24 (ECF No. 1-5, pp. 25–26); Appellant’s Opening Brief, Exh. 9, pp. 64–65 (ECF No. 1-7,
25 pp. 83–84); Appellant’s Reply Brief, Exh. 10, p. 35 (ECF No. 1-8, p. 46); Appellant’s
26 Opening Brief, Exh. 13, pp. 72–73 (ECF No. 1-10, pp. 99–100); Appellant’s
27 Supplemental Opening Brief, Exh. 14, p. 10 (ECF No. 1-11, p. 11); Appellant’s Reply
28 Brief, Exh. 15, pp. 51–52 (ECF No. 1-11, pp. 85–86). The Court determines that these

1 claims, asserted in Byford's timely original petition, share a common core of operative
2 facts with Claim 13; therefore, Claim 13 relates back to the timely original petition and is
3 not barred by the statute of limitations.

4 Claim 14

5 In Claim 14, Byford claims that the trial court permitted the prosecution to make
6 misrepresentations to the jury and to argue improperly about statutorily delineated
7 mitigating circumstances, some of which were irrelevant to the case and not proffered
8 by the defense. Third Amended Habeas Petition (ECF No. 92), pp. 319–22.

9 On the appeal in his first state habeas action, Byford asserted a claim sharing
10 core operative facts with Claim 14, and he incorporated his briefing of that claim into his
11 timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
12 Appellant's Opening Brief, Exh. 6, pp. 54–55 (ECF No. 1-5, pp. 24–25); Appellant's
13 Opening Brief, Exh. 9, pp. 62–64 (ECF No. 1-7, pp. 81–83); Appellant's Reply Brief,
14 Exh. 10, pp. 34–35 (ECF No. 1-8, pp. 45–46); Appellant's Opening Brief, Exh. 13, pp.
15 71–72 (ECF No. 1-10, pp. 98–99); Appellant's Supplemental Opening Brief, Exh. 14, pp.
16 9–10 (ECF No. 1-11, pp. 10–11); Appellant's Reply Brief, Exh. 15, pp. 50–51 (ECF No.
17 1-11, pp. 84–85). The Court determines that this claim, asserted in Byford's timely
18 original petition, shares a common core of operative facts with Claim 14; therefore,
19 Claim 14 relates back to the timely original petition and is not barred by the statute of
20 limitations.

21 Claim 15

22 In Claim 15, Byford claims that the trial court admitted highly prejudicial and
23 cumulative irrelevant evidence. Third Amended Habeas Petition (ECF No. 92), pp. 323–
24 30. Claim 15 includes two subparts—Claims 15A and 15B—but for purposes of this
25 order, Claim 15 can be considered in its entirety, as a single claim.

26 Byford asserted a somewhat similar claim on his direct appeal before the Nevada
27 Supreme Court, and he incorporated his briefing of that claim into his timely original
28 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;

1 Appellant's Opening Brief, Exh. 3, pp. 43–48 (ECF No. 1-3, pp. 62–67); Appellant's
2 Reply Brief, Exh. 4, pp. 11–12 (ECF No. 1-3, pp. 134–35). The Court determines that
3 this claim, asserted in Byford's timely original petition, shares a common core of
4 operative facts with Claim 15; therefore, Claim 15 relates back to the timely original
5 petition and is not barred by the statute of limitations.

6 Claim 16

7 In Claim 16, Byford claims that the trial court failed to record bench conferences
8 and meetings in chambers. Third Amended Habeas Petition (ECF No. 92), pp. 331–35.

9 On the appeal in his first state habeas action, Byford asserted a claim sharing
10 core operative facts with Claim 16, and he incorporated the briefing asserting that claim
11 into his timely original petition in this action. See Petition for Writ of Habeas Corpus
12 (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 11–13 (ECF No. 1-4, pp. 30–
13 32); Appellant's Reply Brief, Exh. 7, p. 7 (ECF No. 1-6, p. 17); Appellant's Opening
14 Brief, Exh. 9, pp. 12–15 (ECF No. 1-7, pp. 32–35); Appellant's Reply Brief, Exh. 10, p. 8
15 (ECF No. 1-8, p. 19); Appellant's Opening Brief, Exh. 13, pp. 11–14 (ECF No. 1-10, pp.
16 38–41); Appellant's Supplemental Opening Brief, Exh. 14, p. 3 (ECF No. 1-11, p. 4);
17 Appellant's Reply Brief, Exh. 15, pp. 8–9 (ECF No. 1-11, pp. 42–43). The Court
18 determines that this claim, asserted in Byford's timely original petition, shares a
19 common core of operative facts with Claim 16; therefore, Claim 16 relates back to the
20 timely original petition and is not barred by the statute of limitations.

21 Claim 17

22 In Claim 17, Byford claims that critical court proceedings were conducted without
23 him present. Third Amended Habeas Petition (ECF No. 92), pp. 336–39.

24 On the appeal in his first state habeas action, Byford asserted a claim sharing
25 core operative facts with Claim 17, and he incorporated the briefing asserting that claim
26 into his timely original petition in this action. See Petition for Writ of Habeas Corpus
27 (ECF No. 1), p. 3; Appellant's Opening Brief, Exh. 6, pp. 11–13 (ECF No. 1-4, pp. 30–
28 32); Appellant's Reply Brief, Exh. 7, p. 7 (ECF No. 1-6, p. 17); Appellant's Opening

1 Brief, Exh. 9, pp. 12–15 (ECF No. 1-7, pp. 32–35); Appellant’s Reply Brief, Exh. 10, p. 8
2 (ECF No. 1-8, p. 19); Appellant’s Opening Brief, Exh. 13, pp. 11–14 (ECF No. 1-10, pp.
3 38–41); Appellant’s Supplemental Opening Brief, Exh. 14, p. 3 (ECF No. 1-11, p. 4);
4 Appellant’s Reply Brief, Exh. 15, pp. 8–9 (ECF No. 1-11, pp. 42–43). The Court
5 determines that this claim, asserted in Byford’s timely original petition, shares a
6 common core of operative facts with Claim 17; therefore, Claim 17 relates back to the
7 timely original petition and is not barred by the statute of limitations.

8 Claim 18

9 In Claim 18, Byford claims that one of the jurors did not meet the constitutional
10 standard of impartiality. Third Amended Habeas Petition (ECF No. 92), pp. 340–42.

11 The Court determines that Byford did not, in either his timely original petition or
12 his timely first amended petition, assert a claim sharing a common core of operative
13 facts with Claim 18. Therefore, Claim 18 does not relate back to either the original or
14 first amended petition, and it is barred by the statute of limitations. Claim 18 will be
15 dismissed on this ground.

16 Claim 19A

17 In Claim 19A, Byford claims that the jurors received an erroneous anti-sympathy
18 instruction. Third Amended Habeas Petition (ECF No. 92), pp. 343–46.

19 Byford asserted a somewhat similar claim on his direct appeal before the Nevada
20 Supreme Court, and he incorporated his briefing of that claim into his timely original
21 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
22 Appellant’s Opening Brief, Exh. 3, pp. 71–73 (ECF No. 1-3, pp. 90–92); Appellant’s
23 Reply Brief, Exh. 4, p. 20 (ECF No. 1-3, pp. 143). The Court determines that this claim,
24 asserted in Byford’s timely original petition, shares a common core of operative facts
25 with Claim 19A; therefore, Claim 19A relates back to the timely original petition and is
26 not barred by the statute of limitations.

1 Claim 19B

2 In Claim 19B, Byford claims that the jurors received an erroneous commutation
3 instruction. Third Amended Habeas Petition (ECF No. 92), pp. 346–48.

4 On the appeal in his first state habeas action, Byford asserted a claim sharing
5 core operative facts with Claim 19B, and he incorporated his briefing of that claim into
6 his timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
7 Appellant’s Opening Brief, Exh. 6, p. 48 (ECF No. 1-5, p. 18); Appellant’s Opening Brief,
8 Exh. 9, pp. 56–57 (ECF No. 1-7, pp. 75–76); Appellant’s Reply Brief, Exh. 10, p. 32
9 (ECF No. 1-8, p. 43); Appellant’s Opening Brief, Exh. 13, p. 64 (ECF No. 1-10, p. 91);
10 Appellant’s Supplemental Opening Brief, Exh. 14, p. 9 (ECF No. 1-11, p. 10);
11 Appellant’s Reply Brief, Exh. 15, p. 46 (ECF No. 1-11, p. 80). The Court determines that
12 this claim, asserted in Byford’s timely original petition, shares a common core of
13 operative facts with Claim 19B; therefore, Claim 19B relates back to the timely original
14 petition and is not barred by the statute of limitations.

15 Claim 20

16 In Claim 20, Byford claims that the jury failed to find clearly applicable mitigating
17 circumstances. Third Amended Habeas Petition (ECF No. 92), pp. 349–51.

18 On the appeal in his first state habeas action, Byford asserted a claim sharing
19 core operative facts with Claim 20, and he incorporated his briefing of that claim into his
20 timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
21 Appellant’s Opening Brief, Exh. 6, pp. 56–59 (ECF No. 1-5, pp. 26–29); Appellant’s
22 Reply Brief, Exh. 7, p. 28 (ECF No. 1-6, p. 38); Appellant’s Opening Brief, Exh. 9, pp.
23 65–67 (ECF No. 1-7, pp. 84–86); Appellant’s Reply Brief, Exh. 10, pp. 35–36 (ECF No.
24 1-8, pp. 46–47); Appellant’s Opening Brief, Exh. 13, pp. 73–76 (ECF No. 1-10, pp. 100–
25 03); Appellant’s Supplemental Opening Brief, Exh. 14, p. 10 (ECF No. 1-11, p. 11);
26 Appellant’s Reply Brief, Exh. 15, pp. 52–53 (ECF No. 1-11, pp. 86–87). The Court
27 determines that this claim, asserted in Byford’s timely original petition, shares a
28

1 common core of operative facts with Claim 20; therefore, Claim 20 relates back to the
2 timely original petition and is not barred by the statute of limitations.

3 Claim 21

4 In Claim 21, Byford claims that character evidence was improperly used in the
5 weighing process for determining death-eligibility. Third Amended Habeas Petition (ECF
6 No. 92), pp. 352–54.

7 Byford asserted a somewhat similar claim on his direct appeal before the Nevada
8 Supreme Court, and he incorporated his briefing of that claim into his timely original
9 petition in this action. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
10 Appellant's Opening Brief, Exh. 3, pp. 76–79 (ECF No. 1-3, pp. 95–98); Appellant's
11 Reply Brief, Exh. 4, pp. 22–23 (ECF No. 1-3, pp. 145–48). The Court determines that
12 this claim, asserted in Byford's timely original petition, shares a common core of
13 operative facts with Claim 21; therefore, Claim 21 relates back to the timely original
14 petition and is not barred by the statute of limitations.

15 Claim 22

16 In Claim 22, Byford claims that the elected officials who adjudicated Byford's trial,
17 appeal and state post-conviction petitions were biased. Third Amended Habeas Petition
18 (ECF No. 92), pp. 355–58.

19 The Court determines that Byford did not, in either his timely original petition or
20 his timely first amended petition, assert a claim sharing a common core of operative
21 facts with Claim 22. Therefore, Claim 22 does not relate back to either the original or
22 first amended petition, and it is barred by the statute of limitations. Claim 22 will be
23 dismissed on this ground.

24 Claim 23

25 In Claim 23, Byford claims that appellate counsel was ineffective for not raising
26 on Byford's direct appeal all the claims contained in Claims 3, 4B, 4C, 5A, 5C, 5E, 5F,
27 5G, 9, 10, 12, 14, 16, 17, 19B, 20, 22, 24, 25 and 26, and for not raising all the federal
28

1 constitutional bases for the claims that were asserted on Byford's direct appeal. Third
2 Amended Habeas Petition (ECF No. 92), pp. 359–60.

3 The Court determines that Claim 23 relates back to Byford's timely original
4 and/or first amended petition, with respect to his claims that his appellate counsel was
5 ineffective for not raising the claims in Claims 3, 4B, 4C, 5A, 5C, 5E, 5F, 5G, 9, 10, 12,
6 14, 16, 17, 19B, 20, 24A, 24B, 24C, 24D(5) and 24E, for the reasons stated in the
7 discussions of those underlying claims. Those claims in Claim 23 are not barred by the
8 statute of limitations.

9 The Court determines that Claim 23 does not relate back to Byford's timely
10 original and/or first amended petition, with respect to his claims that his appellate
11 counsel was ineffective for not raising the claims in Claims 22, 24D(1)–(4), 25 and 26,
12 for the reasons stated in the discussions of those underlying claims. Those claims in
13 Claim 23 are barred by the statute of limitations and will be dismissed on that ground.

14 Claim 24A

15 In Claim 24A, Byford claims that Nevada's lethal-injection protocol is
16 unconstitutional. Third Amended Habeas Petition (ECF No. 92), pp. 361–84.

17 On the appeal in his first state habeas action, Byford asserted a claim sharing
18 core operative facts with Claim 24A, and he incorporated his briefing of that claim into
19 his timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
20 Appellant's Opening Brief, Exh. 6, p. 66 (ECF No. 1-5, p. 36); Appellant's Reply Brief,
21 Exh. 7, pp. 29–30 (ECF No. 1-6, pp. 39–40); Appellant's Opening Brief, Exh. 9, pp. 72–
22 73 (ECF No. 1-7, pp. 91–92); Appellant's Reply Brief, Exh. 10, p. 38 (ECF No. 1-8, p.
23 49); Appellant's Opening Brief, Exh. 13, p. 82 (ECF No. 1-10, p. 109). The Court
24 determines that this claim, asserted in Byford's timely original petition, shares a
25 common core of operative facts with Claim 24A; therefore, Claim 24A relates back to
26 the timely original petition and is not barred by the statute of limitations.

1 Claim 24B

2 In Claim 24B, Byford claims that Nevada's death-penalty scheme does not
3 genuinely narrow the class of persons eligible for the death penalty. Third Amended
4 Habeas Petition (ECF No. 92), pp. 384–87.

5 On the appeal in his first state habeas action, Byford asserted a claim sharing
6 core operative facts with Claim 24B, and he incorporated his briefing of that claim into
7 his timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
8 Appellant's Opening Brief, Exh. 6, pp. 65–66 (ECF No. 1-5, pp. 35–36); Appellant's
9 Reply Brief, Exh. 7, p. 29 (ECF No. 1-6, p. 39); Appellant's Opening Brief, Exh. 9, pp.
10 71–72 (ECF No. 1-7, pp. 90–91); Appellant's Reply Brief, Exh. 10, p. 37 (ECF No. 1-8,
11 p. 48); Appellant's Opening Brief, Exh. 13, pp. 81–82 (ECF No. 1-10, pp. 108–09);
12 Appellant's Reply Brief, Exh. 15, pp. 55–56 (ECF No. 1-11, pp. 89–90). The Court
13 determines that this claim, asserted in Byford's timely original petition, shares a
14 common core of operative facts with Claim 24B; therefore, Claim 24B relates back to
15 the timely original petition and is not barred by the statute of limitations.

16 Claim 24C

17 In Claim 24C, Byford claims that the death penalty is cruel and unusual. Third
18 Amended Habeas Petition (ECF No. 92), p. 388.

19 On the appeal in his first state habeas action, Byford asserted a claim sharing
20 core operative facts with Claim 24C, and he incorporated his briefing of that claim into
21 his timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
22 Appellant's Opening Brief, Exh. 6, p. 66 (ECF No. 1-5, p. 36); Appellant's Opening Brief,
23 Exh. 9, p. 73 (ECF No. 1-7, p. 92); Appellant's Opening Brief, Exh. 13, p. 83 (ECF No.
24 1-10, p. 110); Appellant's Supplemental Opening Brief, Exh. 14, p. 11 (ECF No. 1-11, p.
25 12); Appellant's Reply Brief, Exh. 15, p. 56 (ECF No. 1-11, p. 90). The Court determines
26 that this claim, asserted in Byford's timely original petition, shares a common core of
27 operative facts with Claim 24C; therefore, Claim 24C relates back to the timely original
28 petition and is not barred by the statute of limitations.

1 Claim 24D(1)–(4)

2 In Claim 24D(1)–(4), Byford claims that it is unconstitutional to impose death on
3 an individual under the age of twenty-one at the time of his crime. Third Amended
4 Habeas Petition (ECF No. 92), pp. 388–400.

5 The Court determines that Byford did not, in either his timely original petition or
6 his timely first amended petition, assert a claim sharing a common core of operative
7 facts with Claim 24D(1)–(4). Therefore, Claim 24D(1)–(4) does not relate back to either
8 the timely original petition or the timely first amended petition.

9 Byford cites 28 U.S.C. § 2244(d)(1)(D) and argues that “[t]his claim is timely
10 because it is based on new scientific discoveries,” and that “[t]he new science that
11 forms the factual predicate of this claim could not have been discovered through the
12 exercise of reasonable diligence more than a year prior to the filing of the Third
13 Amended Petition.” Opposition to Motion to Dismiss (ECF No. 116), p. 144. That
14 argument, though, is wholly conclusory; Byford does not identify the scientific
15 discoveries that allegedly form the factual predicate for this claim that he allegedly could
16 not have discovered before January 30, 2019 (one year before he filed his third
17 amended petition). Byford does not make a showing that application of section
18 2244(d)(1)(D) is warranted.

19 Claim 24D(1)–(4) is barred by the statute of limitations, and it will be dismissed
20 on that ground.

21 Claim 24D(5)

22 In Claim 24D(5), Byford claims that Nevada’s death-penalty scheme is
23 unconstitutional because executive clemency is unavailable. Third Amended Habeas
24 Petition (ECF No. 92), pp. 400–01.

25 On the appeal in his first state habeas action, Byford asserted a claim sharing
26 core operative facts with Claim 24D(5), and he incorporated his briefing of that claim
27 into his timely original petition. See Petition for Writ of Habeas Corpus (ECF No. 1), p. 3;
28 Appellant’s Opening Brief, Exh. 6, pp. 67–68 (ECF No. 1-5, pp. 37–38); Appellant’s

1 Opening Brief, Exh. 9, pp. 74–75 (ECF No. 1-7, pp. 93–94); Appellant’s Opening Brief,
2 Exh. 13, pp. 84–85 (ECF No. 1-10, pp. 111–12); Appellant’s Reply Brief, Exh. 15, p. 56
3 (ECF No. 1-11, p. 90). The Court determines that this claim, asserted in Byford’s timely
4 original petition, shares a common core of operative facts with Claim 24D(5); therefore,
5 Claim 24D(5) relates back to the timely original petition and is not barred by the statute
6 of limitations.

7 Claim 24E

8 In Claim 24E, Byford claims that execution in a manner that violates the
9 constitution is prejudicial per se. Third Amended Habeas Petition (ECF No. 92), p. 401.
10 The Court does not read Claim 24E to assert a standalone claim, but rather to set forth
11 argument regarding Claims 24A, 24B, 24C and 24D.

12 Claim 25

13 In Claim 25, Byford claims that the Nevada Supreme Court failed to conduct fair
14 and adequate appellate review. Third Amended Habeas Petition (ECF No. 92), pp. 402–
15 08.

16 The Court determines that Byford did not, in either his timely original petition or
17 his timely first amended petition, assert a claim sharing a common core of operative
18 facts with Claim 25. Therefore, Claim 25 does not relate back to either the original or
19 first amended petition, and it is barred by the statute of limitations. Claim 25 will be
20 dismissed on this ground.

21 Claim 26

22 In Claim 26, Byford claims that the trial court’s failure to give a jury instruction
23 defining the standard of proof as beyond a reasonable doubt in the weighing stage of
24 Byford’s penalty hearing violated his federal constitutional rights. Third Amended
25 Habeas Petition (ECF No. 92), pp. 409–10.

26 The Court determines that Byford did not, in either his timely original petition or
27 his timely first amended petition, assert a claim sharing a common core of operative
28

1 facts with Claim 26. Therefore, Claim 26 does not relate back to either of those timely-
2 filed petitions.

3 Byford cites 28 U.S.C. § 2244(d)(1)(C), arguing that this claim was timely filed
4 because the claim is based on *Hurst v. Florida*, 136 S.Ct. 616 (2016), which was
5 decided on January 12, 2016. See Opposition to Motion to Dismiss (ECF No. 116),
6 p. 151. Byford argues:

7 The Claim is not untimely because it is based upon the assertion of
8 a constitutional right that the United States Supreme Court recognized for
9 the first time on January 12, 2016 in its *Hurst* decision. As the State noted,
10 Byford presented this claim in his third amended state postconviction
11 petition, which was filed January 11, 2017, and thus within one year of the
12 date on which the new constitutional right was initially recognized.

13 *Id.* (citations omitted).

14 Byford's argument lacks merit. Byford's assertion of this claim in a habeas
15 petition filed in state court on January 11, 2017, one day short of the first anniversary of
16 the *Hurst* decision does not necessarily render timely his assertion of the claim in his
17 third amended petition in this case on January 30, 2020. Byford does not argue that any
18 statutory tolling based on his third state habeas action would render the claim in this
19 action timely; it appears that it would not, as Byford's third state habeas action
20 concluded on September 13, 2019, more than four months before his third amended
21 petition was filed in this action. See Order of Affirmance, Exh. 49 (ECF No. 109-21).

22 Moreover, for 28 U.S.C. § 2244(d)(1)(C) to apply, *Hurst* must represent a new
23 rule of constitutional law made retroactive to cases on collateral review. See 28 U.S.C.
24 § 2244(d)(1)(C). That is not the case, however. The Supreme Court has ruled that *Hurst*
25 does not establish a new rule that applies retroactively on collateral review. See
26 *McKinney v. Arizona*, 140 S.Ct. 702, 708 (2020) ("[*Ring v. Arizona*, 536 U.S. 584
27 (2002)] and *Hurst* do not apply retroactively on collateral review." (citing *Schriro v.*
28 *Summerlin*, 542 U.S. 348, 358 (2004))).

29 The Court determines that Claim 26 is barred by the statute of limitations, and it
30 will be dismissed on that ground.

1 Claim 27

2 In Claim 27, Byford claims that he was prejudiced by the cumulative effect of the
3 errors alleged in his third amended habeas petition. Third Amended Habeas Petition
4 (ECF No. 92), pp. 411–19. The Court determines that this claim of cumulative error is
5 not barred by the statute of limitations, as underlying claims upon which it is based are
6 not barred.

7 E. Motion for Leave to Conduct Discovery

8 Byford requests leave to conduct discovery regarding the question of procedural
9 default of certain of his claims and regarding the merits of certain of his claims. See
10 Motion for Leave to Conduct Discovery (ECF Nos. 117, 121). In this order, the Court
11 denies Respondents' motion to dismiss, without prejudice, with respect to the
12 procedural default issues, and the Court does not in this order address the merits of any
13 of Byford's claims. Therefore, there is no showing of good cause for Byford to conduct
14 discovery relative to the motion to dismiss. The Court will deny Byford's motion for leave
15 to conduct discovery. Byford may file a new motion for leave to conduct discovery, if
16 factually and legally justified, in conjunction with his reply to Respondents' answer, as
17 contemplated in the scheduling order entered October 24, 2019 (ECF No. 88).

18 F. Motion for Evidentiary Hearing

19 Byford requests an evidentiary hearing regarding the question of procedural
20 default of certain of his claims. See Motion for Evidentiary Hearing (ECF No. 119).
21 In this order, the Court denies Respondents' motion to dismiss. without prejudice, with
22 respect to the procedural default issues. Therefore, an evidentiary hearing relative to
23 those issues is unwarranted at this time. Byford's motion for an evidentiary hearing will
24 be denied. Byford may file a new motion for an evidentiary hearing, if factually and
25 legally justified, in conjunction with his reply to Respondents' answer, as contemplated
26 in the scheduling order entered October 24, 2019 (ECF No. 88).

1 IV. CONCLUSION

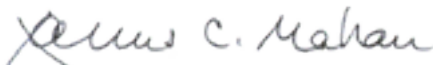
2 **IT IS THEREFORE ORDERED** that Respondents' Motion to Dismiss
 3 (ECF No. 107) is **GRANTED IN PART AND DENIED IN PART**. The following claims in
 4 Petitioner's third amended habeas petition are dismissed as barred by the statute of
 5 limitations: Claims 1D, 1U, 1Y, 18, 22, 24D(1)–(4), 25, 26, and the claims in Claim 23
 6 that Byford's appellate counsel was ineffective for not raising the claims in Claims 22,
 7 24D(1)–(4), 25 and 26. In all other respects, Respondents' Motion to Dismiss is denied.
 8 This order is without prejudice to Respondents asserting the defenses of exhaustion,
 9 procedural default and ripeness in their answer to the remaining claims in Petitioner's
 10 third amended habeas petition.

11 **IT IS FURTHER ORDERED** that Petitioner's Motion for Leave to Conduct
 12 Discovery (ECF Nos. 117, 121) is **DENIED**.

13 **IT IS FURTHER ORDERED** that Petitioner's Motion for Evidentiary Hearing
 14 (ECF No. 119) is **DENIED**.

15 **IT IS FURTHER ORDERED** that Respondents shall, within 180 days from the
 16 date of this order, file an answer, responding to the remaining claims in Petitioner's
 17 Third Amended Petition for Writ of Habeas Corpus (ECF No. 92). The time for Petitioner
 18 to file a reply to Respondents' answer, as set forth in the October 24, 2019, scheduling
 19 order (ECF No. 88), will be extended to 180 days. In all other respects, the schedule for
 20 further proceedings set forth in the October 24, 2019, scheduling order (ECF No. 88)
 21 will remain in effect.

22 DATED August 27, 2021.

23
 24 
 25 JAMES C. MAHAN,
 26 UNITED STATES DISTRICT JUDGE
 27
 28